No. 86-1099

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

CHRISTOPHER N. GALANOS,

Petitioner,

versus

HONORABLE ALEX T. HOWARD, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WRIT OF CERTIORARI

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QUESTION PRESENTED

1. The question is whether federal courts must recognize the state and federal privilege which affords protection to the confidences disclosed by a patient (petitioner) to his psychiatrist, when the patient's mental state is not an issue in the litigation. This privilege is or should be constitutionally protected.*

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* The parties in this case are: William H. McGill, plaintiff; and Defendants City of Mobile, Winston J. Orr, Lester Hargrove, Charles S. Summers, and Petitioner Galanos. Defendants Bernard Henebry and Robert P. Larison are deceased and have been dismissed pursuant to Rule 25 of the Federal Rules of Civil Procedure. This case has been on the docket of Judge Emmett R. Cox at all times relevant to this petition. The case was transferred to the docket of Judge Alex T. Howard, Jr. on October 15, 1986. App. I, *infra* 45a. Therefore, The Honorable Judge Alex T. Howard, Jr. is named as the Respondent herein.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

CHRISTOPHER N. GALANOS,

Petitioner,

versus

HONORABLE ALEX T. HOWARD, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A writ of certiorari is sought to review the Court of Appeal's order denying petitioner's constitutionally protected patient/psychiatrist privilege.

OPINIONS BELOW

There was no formal opinion by the United States Court of Appeals for the Eleventh Circuit. The order of that court denying petitioner's writ of mandamus is set forth in App. H, *infra*, 44a. The District Court Judge's (Respondent's) Memorandum Opinion denying petitioner's motion to quash depositions and motion for protective order is set forth in App. G, *infra*, 42a-43a.

JURISDICTION

The order of the Court of Appeals (App. H, *infra*, 44a) was entered on October 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1982).

This petition for a writ of certiorari is being filed within ninety (90) days from the denial of petitioner's writ of mandamus on October 3, 1986.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fed. R. Evid. 501 provides, in pertinent part, that:

> ". . . [T]he privilege of a witness, person . . . shall be governed by . . . the common law as . . . interpreted by the Courts of the United States . . . [I]n civil actions and proceedings, with respect to a claim or defense as to which State law supplies the rule of decision, the privilege shall be determined in accordance with State law."

2. Ala. Code §34-26-2 (1975) provides, in pertinent part, that:

> ". . . [T]he confidential relations and communications between . . . licensed psychiatrists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

3. 42 U.S.C. §290ee-3 (1985) provides, in pertinent part, that:

> "Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function . . . shall . . . be confidential and be disclosed only . . . under subsection (b) of this section."

4. 42 C.F.R. §2.13(c) (1985) provides, in pertinent part, that:

> "The prohibition or unauthorized disclosure covers all information about patients . . ."

STATEMENT OF THE CASE

A. FACTS MATERIAL TO THE QUESTION PRESENTED

This action was instituted on August 14, 1984, as a complaint for damages for wrongful termination of employment against various defendants, including petitioner Galanos. Plaintiff was a police officer for the City of Mobile. His complaint goes to the sufficiency of the process afforded him in his termination, the reasons for his termination, an allegation that there was a conspiracy for his termination, and an allegation that plaintiff's first amendment "right to prosecute" defendant Galanos was infringed. App. B, *infra* 12a-29a. Named as defendants are plaintiff's employer, the City of Mobile, various supervisors in the police department who plaintiff alleges conspired to terminate him, and petitioner Galanos. Galanos is the district attorney for Mobile County. The complaint arises out of an incident wherein plaintiff detained petitioner Galanos. Plaintiff's basic theory is that Galanos was driving under the influence of alcohol or drugs;

that plaintiff tried to arrest Galanos but that his supervisors interfered; and that the City, his supervisors and Galanos thereafter conspired to terminate plaintiff's employment.

Following plaintiff's notice of deposition of Galanos' psychiatrist, Galanos filed a motion to quash asserting the psychiatrist-patient privilege. App. C, *infra* 30a-31a. On December 27, 1985, the Magistrate recommended that Galanos' motion to quash be denied. App. D, *infra* 32a-34a. Galanos filed an objection to the Magistrate's recommendation on January 2, 1986. App. E, *infra* 35a-36a. An amended motion to quash was filed on February 3, 1986. App. F, *infra* 37a-41a. The District Court Judge accepted the Magistrate's recommendation on June 25, 1986. App. G, *infra* 42a-43a. Galanos then petitioned the Eleventh Circuit Cout of Appeals for a writ of mandamus ordering the district judge to quash the deposition of his psychiatrist. The Eleventh Circuit denied this petition on October 3, 1986. App. H, *infra* 44a.

B. BASIS FOR FEDERAL JURISDICTION IN THE TRIAL COURT

Plaintiff alleges jurisdiction pursuant to 28 U.S.C. §§1331 and 1343 (1982) claiming violations of his civil rights under 42 U.S.C. §§1983 and 1985 (1982). App. A, *infra* 1a-11a.

C. REASONS FOR GRANTING THE WRIT

1. ***Petitioner did not inject his mental state as an issue.***

As the issues are framed by plaintiff's complaint, Galanos' communications with his psychiatrist are not at issue. What plaintiff must show on his causes of action is wholly unrelated to whether Galanos was in the state which plaintiff alleges on that evening. Plaintiff's complaint goes to the sufficiency of

the process afforded him in his termination, the reasons for his termination, an allegation that there was a conspiracy for his termination, and an allegation that his first amendment rights were punished. Galanos' mental state, therefore, simply does not bear on the issues in this case.

2. ***There is a Violation of Galanos' Constitutional Rights***

Through a series of cases addressing various particular issues, this Court has recognized a zone of privacy as a fundamental constitutional right. These cases include *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973); and *Griswold v. Connecticut*, 381 U.S. 479 (1965). The California Supreme Court has even suggested that the United States Constitution mandates protection of confidentiality for psychotherapy:

> [A] patient's interest in keeping such confidential revelations from public review, in retaining his substantial privacy, has deeper roots than the California [statutory rules of evidence] and draws sustenance from our constitutional heritage. In *Griswold v. Connecticut*, [citation omitted], the United States Supreme Court declared that "Various guarantees [of the Bill of Rights] create zones of privacy," and we believe that the confidentiality of the psychotherapeutic session falls within one such zone.

In re Lifschutz, 85 Cal. Rptr. 829, 839, 467 P.2d 557, 567 (1970). It is the first amendment which has largely been cited as the source of this "right of privacy." The fourth amendment provides that people have the right to be secure in their persons, and exposing oneself in psychotherapy is arguably within the ambit of protection from this amendment. Should

a confidence be exposed to a psychotherapist which might tend to incriminate the patient, then obviously the fifth amendment should apply.

The ninth amendment recognizes that certain rights which people have shall not be denied or disparaged, and the tenth amendment specifically says that powers not delegated to the United States by the Constitution are reserved to the states, respectively, or to the people. From this it is arguable that the states' decision regarding confidentiality must be respected. This is discussed in the cases which follow.

3. ***Federal Law Recognizes Confidentiality for Certain Chemically Dependent Persons***

Congress has recognized the necessity for treatment of chemically dependent people. Assume for purposes of argument that what counsel for plaintiff asserts in his motion is true; namely, that Galanos was seeking treatment from his psychiatrist for drug abuse. Certainly this Court should look to the expressed policy of Congress as set forth in 42 U.S.C. §290ee-3 (1985). See "Constitutional and Statutory Provisions Involved" section, *supra*, p. 3.

This federal privilege for persons seeking treatment for chemical abuse would apply to any individual who has applied for or been given diagnosis or treatment for alcohol or drug abuse. 42 C.F.R. §2.11(i) (1985). The prohibition of the disclosure of information about an alcohol or drug abuse patient covers *all* information about patients, including their "attendance or absence, physical whereabouts, or status as patients." 42 C.F.R. §2.13(c) (1985). When the Code of Federal Regulations provides that the hospital or provider of medical care may not even cite the particular code sections when telling a court of law why they may not produce certain records, that is an extremely strong statement.

42 C.F.R. §2.13-1(d) (1985). Counsel of record has had the unfortunate experience of going through that in the Mobile County Circuit Court, and it is assuredly a tenuous proposition at best. Because of the congressional recognition for the need for privacy in the area of the psychiatrist/psychologist-patient relationship the courts have the authority to recognize this privilege. *See, e.g., In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied* 461 U.S. 983 (1983).

As noted in *Zuniga*, the psychotherapist-patient privilege is *mandated* by reason and experience, *citing* Fed. R. Evid. 501, at 639. *Zuniga* further cited *forty* states which have adopted some form of privilege in this context. *Id.* at n.3. As the Eleventh Circuit recognized in *Matter of International Horizons, Inc.*, 689 F.2d 996, 1004 (11th Cir. 1982):

> There is indeed authority for the proposition that federal courts should recognize state evidentiary privileges where this can be done at no substantial cost to federal policies.

Indeed, here the federal and state policies are identical.

4. ***State Law Recognizes a Privilege***

The psychiatrist-patient privilege is codified at *Ala. Code* §34-26-2 (1975), *supra*, p. 2.

5. ***Comity and Federalism***

Foremost, it is indeed strange to conceive that the testimony of this doctor could be privileged in state court, and not privileged in federal court. How that can be reconciled with constitutional principles of comity and federalism strains the imagination, even though decisions of some courts of appeal violate these principles.

For example, in a case arising out of the Middle District of Alabama, *Broadway v. City of Montgomery*, 381 F. Supp. 514 (M. D. Ala. 1974), Judge Varner stated without further explanation:

> In Federal Courts privilege is determined under state law. *Connecticut Mutual Life Insurance Co. v. Union Trust Co.*, 112 U.S. 250, 5 S.Ct. 119, 28 L.Ed. 708.

Id. at 516 n.1. Recognize that Judge Varner believed that the *Union Trust Co.* case, which will be discussed later (which held that a New York statute prohibited a physician from testifying) was still good law.

Moreover, various other jurisdictions have noted that failure to apply state rules of privilege would cause "a serious problem of interference with state policy." *See, e.g., Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 43 (4th Cir. 1963). In *Krizak*, a state law prohibited accident reports from being used in civil trials. The *Krizak* court applied the state law of privilege, but allowed the accident report on other grounds. The *Krizak* opinion noted, however, that "probably the majority of federal courts have applied state statutorily created privileges, at least in diversity cases." *Id.* at 43 n.3 (citing cases). In an extremely thoughtful and well-reasoned decision, *Lora v. Board of Education*, 74 F.R.D. 565 (E.D. N.Y. 1977) (hereinafter "*Lora*"), Judge Weinstein recognized that the State of New York afforded protection to psychiatrist-patient communications through a state law. Recognizing that in any given instance the special federal interest in seeking the truth in a federal question case may require disclosure despite the existence of a state rule, Judge Weinstein observed:

> [W]e acknowledge that "a strong policy of comity between state and federal sovereignties

> compels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. " [citations omitted] *If the state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.*

Lora, 774 F.R.D. at 576 (emphasis supplied).

There is a second and equally compelling line of cases which demonstrates that the results in a lawsuit should not be different simply because this case is in federal court as opposed to state court. *See, e.g., Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); and *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). As Justice Marshall noted in the *Walker, supra*, case:

> There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants.

Walker, supra, at 753. A careful analysis of those cases further discloses that the mere denomination of the rule of law as "substantive" or "procedural" is not determinative. A considered reflection of these cases clearly reveals a federal policy that forum shopping is not to be allowed, and that the outcome of litigation should be the same no matter whether the plaintiff has selected a state or federal forum.

6. *Lora and a Consideration of the Policy Questions in This Case*

In *Lora*, it was alleged that a school district's standards for identification and educational placement of emotionally handicapped children were applied in an arbitrary and racially discriminatory manner. Plaintiff sought an order compelling production of fifty randomly selected, anonymous files. Judge Weinstein went through a thoughtful and well-reasoned process to ultimately allow disclosure of certain limited information. Recognize that in *Lora* the whole issue in the case was the method by which information in this file was used to place the emotionally handicapped children. That is not true in the case at bar, where the petitioner Galanos' emotional or mental state is not at issue. *Lora* addresses the constitutional nature of these privacy claims, *Id.* at 569, emphasizing that what a psychiatric patient confides to his therapist is never expected to be revealed to the world. *Id.* at 571. There is a further discussion of why it is so important to afford comity to the legislative policy of the state. *Id.* at 575-576. Finally, and a vital distinguishing factor from the outcome of *Lora* and this case, Judge Weinstein noted that a crucial element of the privilege is intent. If the patient makes a communication expecting it to be disclosed, there is no privilege. It was clear to Judge Weinstein in *Lora* that there was no such intent that the communication remain confidential, and that there was no reasonable expectation that the information would not be disclosed. *Id.* at 585.

Finally, the most often quoted language of any case in the decisions which specifically address this issue is found in *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955):

> In regard to mental patients, the policy behind such a statute [affording a privilege] is particularly clear and strong. Many physical ailments might be treated with some

> degree of effectiveness by a doctor whom the patient did not trust, but a psychiatrist must have his patient's confidence or he cannot help him. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say - and all that the psychiatrist learns from what they say - may be revealed to the whole world on a witness stand."

Quoting Guttmacher and Weihofen, *Psychiatry and the Law* 272 (1952). An examination of *Lora* (cited with approval by the Eleventh Circuit in *Matter of International Horizons, Inc.*, 689 F.2d 996 (11th Cir. 1982)) and *Taylor* (just quoted) points out the deficiencies in the Eleventh Circuit's decision in *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), which will be further distinguished later in this petition. As noted by the Sixth Circuit in *In re Zuniga*, 714 F.2d 632, 638 (6th Cir.) *cert. denied* 464 U.S. 983 (1983), the *Lindstrom* opinion simply equated the psychotherapist privilege with the physician-patient privilege "without analyzing the unique aspects of the psychotherapist-patient relationship."

7. ***The Magistrate's Order is not well-reasoned.***

The District Judge denied the motion to quash, based on the Recommendation of the Magistrate. That Recommendation is set forth in App. D, *infra* 32a-34a. This portion of the petition will discuss why that Recommendation does not accurately represent the controlling law. The Recommendation cites six cases in support of allowing the psychiatrist's deposition to proceed. None of these six cases is on point or appropriate authority for the propositions advanced.

The case of *Trammel v. United States*, 445 U.S. 40 (1980), is cited for the proposition that federal courts generally restrictively recognize testimonial privileges. While that quotation is indeed on page 50 of the opinion, the remainder of the opinion is supportive of the proposition advanced by petitioner. Contrary to the emerging evolution of the psychotherapist-patient privilege, the privilege in *Trammel*, spousal testimony, had medieval origins. *Id.* at 44. This is to be contrasted to the emerging development of the necessity in according confidentiality to psychotherapist-patient communications. Consistent with this idea is the Court's note that Congress manifested an intention "not to freeze the law of privilege," but rather to " provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." *Id.* at 47. The privileges between priests and penitent, attorney and client, and *physician and patient* limit protection to private communications, the Court noted, and these privileges "are rooted in the imperative need for confidence and trust." *Id.* at 51. The marital testimonial under examination in *Trammel*, the Court continued, "stands in marked contrast to these three privileges." *Id.* Accordingly, while you will find the statement cited by the Magistrate in the *Trammel* opinion, the decision in its entirety actually emphasizes the importance of confidential physician-patient communications.

Further, three cases are cited for the proposition that the federal common law has not recognized a general physician-patient privilege. However, each of those cases addressed a *criminal case*, clearly not relevant to the civil case at bar. In *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), the Court based its opinion that certain psychiatric testimony must be disclosed on the sixth amendment right of confrontation of witnesses in a criminal case. *Id.* at 1159, 1163.

The second case cited by the Magistrate, *United States v. Meagher*, 531 F.2d 752 (5th Cir.) *cert. denied* 429 U.S. 853 (1976), addressed a *criminal case* where the defendant claimed innocence by reason of insanity. By doing so, it is clear that the defendant placed his mental capacity at issue, and accordingly *Meagher* does not give guidance for this civil case where petitioner has *not* placed his mental or emotional condition at issue.

Finally, *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971), also addressed a case where the criminal defendant claimed innocence by reason of insanity, and further, sought to prevent the disclosure of a court-ordered examination. *Harper*, therefore, likewise, affords no guidance in a civil suit such as this.

Another case, *American Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336 (5th Cir. 1981), addressed a case wherein a government agency claimed privilege based on a state code. The privilege was held not applicable because, first, the files sought to be produced were created before enactment of the code affording confidentiality. *Id.* at 1344. Second, the files in question were open to all members of the Mississippi Legislature. *Id.* Finally, and of most importance, there was no indication that disclosure of the files for a now-defunct state agency would hamper current or future government operations – the only possible justification for privilege.

Id. It was on these specified bases that the court found the privilege created by this state statute inapplicable. These grounds do not apply to the case at bar.

The Recommendation asserted that the majority of federal decisions appear to reject the psychotherapist privilege, *citing In re Doe*, 711 F.2d 1187, 1193 (2d. Cir. 1983). That is a misleading citation because you will find that the court in *Doe* noted that the trial judge's *in camera* examination of the patient files in question disclosed there were no communications in the files of the intensely personal nature so that the psychotherapist-patient privilege should apply.

Moreover, the Recommendation asserted that the majority of federal decisions appear to reject the psychotherapist privilege, citing *Doe*. By contrast, consider the following:

> The special need for the privilege in psychotherapy treatment is long recognized and widely supported by Courts and commentators.

Mutual of Omaha Insurance Co. v. American National Bank and Trust Co., 610 F.Supp. 546, 548-49 (D. Minn. 1985) (citations omitted). In fact, in *Taylor v. United States*, 222 F.2d 398 (D.C. Cir. 1955), the court refused to allow the testimony of a psychotherapist, applying a District of Columbia statute, even though the criminal defendant in that case asserted his mental or emotional status as a defense. Further, statements that "the physician-patient privilege, founded in state statute, has been honored in most jurisdictions" are found in cases. *Mariner v. Great Lakes Dredge & Dock Co.*, 202 F.Supp. 430, 433 (N.D. Ohio 1962) (citing cases). There is also a decision of this Court admittedly predating *Erie*, *Connecticut Mutual Life Insurance Co. v. Union Trust Co.*, 112 U.S. 250 (1884), wherein this Court

upheld the application of a New York State law which prevented a physician from disclosing any information he acquired in attending a patient, in a professional capacity. As Judge Weinstein noted, psychotherapists and courts "share a general consensus that, because of the uniquely personal nature of mental and emotional therapy, accurate diagnosis and effective treatment require an environment of confidentiality." *Lora*, 74 F.R.D. at 571 (citing authority).

In sum, it is submitted that there are extremely important policy positions which must be considered in the context of a civil case, which were not addressed in the criminal cases discussed by the Recommendation accepted by the Trial Judge and the Eleventh Circuit.

8. ***An Appropriate Protective Order***

A review of the Recommendation accepted by the Trial Judge would lead one to the conclusion that the simple assertion there is no privilege answers the question and the information must then be disclosed. That is not correct. As noted in *Farnsworth v. Proctor & Gamble Co.*, 758 F.2d 1545, 1548 (11th Cir. 1985):

> Rule 26(c) gives the district court discretionary power to fashion a protective order. The decision does not depend on a legal privilege.

In *Farnsworth*, a tampon manufacturer sought information from the Center for Disease Control with regard to names and addresses of women who participated in research. While recognizing that the information was certainly relevant and could be of significance to the tampon manufacturer's trial preparation and defense, the trial judge nonetheless withheld certain information. This was true even though there was no express guaranty of confidentiality from the participants in the survey. *Id.* at 1547. That is a stark contrast to

the expectation of confidentiality which a patient seeks from his psychotherapist. As even the cases cited in this petition note, psychotherapy depends on absolute confidence that treatment shall remain private. A protective order should have been granted.

CONCLUSION

Congress and the State of Alabama provided a cloak of secrecy to communications between petitioner and his psychiatrist. Petitioner did not inject his mental condition into this litigation, and indeed, it does not even bear on the issues as framed by plaintiff. Petitioner is entitled to insist upon protection of his constitutional rights from unwarranted governmental intrusion. While it would be tempting for this Court to discard this petition as a mere discovery dispute, such a refusal to enforce the federal and state privilege against disclosure would run counter to an emerging encouragement of treatment for chemical or alcohol abuse. This decision would have far reaching ramifications. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF ALABAMA SOUTHERN DIVISION

CASE NO. 84-0951-C

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, a municipal corporation, WINSTON J. ORR, LESTER HARGROVE, CHARLES S. SUMMERS, BERNARD HENEBRY, ROBERT P. LARISON, and CHRIS N. GALANOS,

Defendants.

Filed August 14, 1984

FIRST CAUSE OF ACTION

I.

This is a Civil Rights suit brought under 42 U.S.C. Section 1983 and 1985. From July 6, 1971 through October 18, 1983, the Plaintiff was at all times a policeman employed by the Police Department of the Defendant City of Mobile. The Defendant City of Mobile, a municipal corporation (herein referred to "City of Mobile") was at all times a municipality located within the State of Alabama and as such was an arm or agency of the State of Alabama. The Defendant Winston J. Orr (herein referred to as "Orr") was at all times relevant hereto the Chief of Police of the City of Mobile and was Plaintiff's ultimate superior within the Mobile Police Department,

the Plaintiff's place of employment. The Defendant Orr was at all times relevant hereto acting as an agent, servant, or employee of the City of Mobile and is sued both in his individual capacity and in his official capacity as a Police Chief of the City of Mobile. The Defendant Charles S. Summers was at all times acting as an agent, servant or employee of the Defendant City of Mobile as a Captain in the Patrol Division of the Mobile Police Department and is sued here individually and in his official capacity as a Captain in the Police Department of the City of Mobile. The Defendant Bernard Henebry was at all times acting as an agent, servant or employee of the Defendant City of Mobile and is here sued in his individual capacity as well as in his official capacity as a Major of the Defendant City of Mobile's Police Department. The Defendant Robert P. Larison was at all times acting as an agent, servant or employee of the Defendant City of Mobile and is here sued individually as well as in his official capacity as a Chief and Assistant Chief of the Mobile Police Department. The Defendant Chris N. Galanos (herein referred to as "Galanos") was at all times relevant hereto the District Attorney for Mobile County, Alabama. The Defendant Galanos is sued individually and in his official capacity as District Attorney of Mobile County, Alabama.

Jurisdiction of this cause is under Title 28 U.S.C. Section 1331 and 1343.

II.

On the night of September 7, 1983, while the Plaintiff was carrying on routine patrol duty in his capacity as a police officer of the City of Mobile, he arrested the Defendant Galanos on a charge of driving an automobile under the influence of a substance which impaired his mental or physical faculties to a degree which rendered him incapable of safely driving. The arrest of the Defendant Galanos was pursuant to

the Plaintiff's sworn legal duty to arrest persons who commit crimes in the presence of a police officer. Subsequent to the arrest of the Defendant Galanos by the Plaintiff, the Plaintiff, pursuant to his legal duties, attempted to process the arrest by signing a warrant against the Defendant Galanos charging him with the crime for which he was arrested, to-wit, DUI. The Defendants, individually, and pursuant to a conspiracy among themselves, thwarted and prevented the Plaintiff from processing the arrest, signing a warrant against the Defendant Galanos and performing his legal duties in and about the prosecution of such warrant. The Defendants' activities included causing the Plaintiff to be dismissed from his employment with the City of Mobile Police Department. The Plaintiff alleges that the actions of the Defendants, individually and collectively, in a conspiracy continued from the day after the Defendant Galanos' arrest, to-wit, September 8, 1983, when the Defendants Galanos and Orr met concerning Galanos' arrest and continued to October 18, 1983, when the Plaintiff's dismissal became final. The Defendants' activities were directed toward pressuring the Plaintiff into not prosecuting Galanos and retaliating against the Plaintiff for making the arrest and attempting to prosecute it.

III.

As a public employee and as a citizen of the United States the Plaintiff McGill, at all times relevant hereto, was protected by the First and Fourteenth Amendments to the Constitution of the United States. Under the First Amendment to the Constitution of the United States the Plaintiff had a constitutional right to exercise free speech. Under the First Amendment to the Constitution of the United States the Plaintiff could not be punished or retaliated against by the Defendants for his exercise of free speech. Not only was the Plaintiff's exercise of free speech protected by the First Amendment in and of itself, the Plaintiff was also protected by various

State of Alabama Statutes which prohibited the Defendants from obstructing justice or otherwise interfering with a police officer, such as McGill, in carrying out of his duties under the law. Specifically, Title 13A, Section 13A-6-25 Code of Alabama 1975, entitled "Criminal Coercion" prohibits any person from damaging the property or reputation of another "with intent thereby to induce the threatened person or another against his will to . . . refrain from doing a lawful act". The Plaintiff alleges that the prosecution of the Defendant Galanos was the doing of a lawful act under said statute. Title 13A, Section 13A-10-23(a) Code of Alabama 1975, entitled "Intimidating a Witness" prohibits any person from "by use of a threat directed to a witness or a person he believes will be called as a witness in any official proceedings to: (1) corruptly influence the testimony of that person;".

The Plaintiff alleges that the Plaintiff was exercising his protected right of free speech under the First Amendment by arresting Galanos, by attempting to prosecute Galanos including the offering of testimony in the form of a sworn affidavit. Plaintiff's attempt to exercise his right of free speech was a substantial or motivating cause of the Plaintiff's dismissal from his public employment as a police officer of the Defendant City of Mobile. The Plaintiff claims damages from the Defendants, separately and severally, under 42 U.S.C. Section 1983, for the violation of his right of free speech under the First Amendment to the Constitution of the United States. The Plaintiff claims damages against the Defendants under 42 U.S.C. Section 1985(2) providing, inter alia, a cause of action against any two or more persons who "conspire for the purpose of impeding, hindering, or obstructing, or defeating, in any manner, the due course of justice in any State . . . , with intent to deny any citizen equal protection of the laws, ..." The Plaintiff alleges specifically, that the Defendants conspired among themselves to deny the Plaintiff individually, and as a member of the class of persons

within the Mobile Police Department protected by the statutes cited above, equal protection of the laws which permitted and required the Plaintiff to prosecute anyone for the commission of a criminal offense in his presence. Plaintiff alleges that the conspiracy to retaliate against Plaintiff for performing his legal duty will have a chilling effect upon other members of the Plaintiff's class in the exercise of their right of free speech.

IV.

The Plaintiff prays that this Court will award to the Plaintiff compensatory damages, including damages for lost past and future wages, mental distress, humiliation, and interest on lost wages. The Plaintiff further prays that this Court will award to the Plaintiff punitive damages to punish the Defendants, and in this regard alleges that the Defendants' conduct was motivated by evil motive or intent or involved reckless or callous indifference to federally-protected rights. The Plaintiff claims a reasonable attorney's fee and costs.

The Plaintiff further prays that upon the hearing of this cause this Court will issue a permanent injunction against the Defendants from enforcing the Plaintiff's dismissal from the Mobile Police Department and ordering that the Plaintiff be reinstated in good standing to his previous position with the Mobile Police Department and will further order that the dismissal of the Plaintiff and anything pertaining thereto be expunged from the Plaintiff's employment record.

WHEREFORE, the Plaintiff demands Judgement against the Defendants separately and severally, in the amount of $5,000,000.00.

SECOND CAUSE OF ACTION

I.

The Plaintiff incorporates herein all the allegations of paragraphs I through IV of the First Cause of Action.

II.

At all times relevant hereto, the Plaintiff's employment with the Defendant City of Mobile's Police Department constituted a property right. The Plaintiff alleges that under the Fourteenth Amendment to the Constitution of the United States the Defendants could not deprive the Plaintiff of this property right without due process of law. The Plaintiff alleges that the Defendants individually, and in a conspiracy among themselves, did deprive the Plaintiff of his property right in his public employment with the Defendant City of Mobile's Police Department without due process of law. Specifically, the Plaintiff alleges that although the substantial and motivating reason for the Plaintiff's termination as an employee of the City of Mobile Police Department was the Plaintiff's performance of his right and duty to arrest, prosecute, and testify against the Defendant Galanos for a DUI occurring in Plaintiff's presence on September 7, 1983, the Defendants expressly denied the Plaintiff a due process hearing on his dismissal as a result of said September 7, 1983 incident involving the Defendant Galanos' arrest.

III.

The Plaintiff prays that this Court will award to the Plaintiff compensatory damages, including damages for lost past and future wages, mental distress, humiliation, and interest on lost wages. The Plaintiff further prays that this Court will award to the Plaintiff punitive damages to punish

the Defendants, and in this regard alleges that the Defendants' conduct was motivated by evil motive or intent or involved reckless or callous indifference to federally-protected rights. The Plaintiff claims a reasonable attorney's fee and costs.

The Plaintiff further prays that upon the hearing of this cause the Court will issue a permanent injunction against the Defendants from enforcing the Plaintiff's dismissal from the Mobile Police Department and ordering that the Plaintiff be reinstated in good standing to his previous position with the Mobile Police Department and will further order that the dismissal of the Plaintiff and anything pertaining thereto be expunged from the Plaintiff's employment record.

WHEREFORE, the Plaintiff demands Judgement against the Defendants separately and severally in the amount of $5,000,000.00.

THIRD CAUSE OF ACTION

I.

The Plaintiff incorporates herein all the allegations of paragraphs I through IV of the First Cause of Action.

II.

At all times relevant hereto the Plaintiff was protected by the due process clause of the Fourteenth Amendment to the Constitution of the United States which prohibited the Defendants from denying the Plaintiff his liberty without due process of law. The Plaintiff alleges that the Defendants, individually, and in a conspiracy with each other, denied the Plaintiff his liberty by causing him to be dismissed from the City of Mobile Police Department on October 18, 1983, for exercising or attempting to exercise his legal duty in

prosecuting and testifying against the Defendant Galanos for a DUI occurring on September 7, 1983. Specifically, the Plaintiff alleges that the Plaintiff's dismissal from the City of Mobile Police Department permanently injured and damaged the Plaintiff's good name, reputation, honor and integrity by dismissing him from the Police Department for conduct unbecoming a police officer. Said dismissal of the Plaintiff permanently damaged and adversely affected his present and future employment opportunities as a policeman, not only with the Defendant City of Mobile but with any other law enforcement agency.

III.

The Plaintiff prays that this Court will award to the Plaintiff compensatory damages, including damages for lost past and future wages, mental distress, humiliation, and interest on lost wages. The Plaintiff further prays that this Court will award to the Plaintiff punitive damages to punish the Defendants, and in this regard alleges that the Defendants' conduct was motivated by evil motive or intent or involved reckless or callous indifference to federally-protected rights. Plaintiff claims a reasonable attorney's fee and costs.

The Plaintiff further prays that upon the hearing of this cause this Court will issue a permanent injunction against the Defendants from enforcing the Plaintiff's dismissal from the Mobile Police Department and ordering that the Plaintiff be reinstated in good standing to his previous position with the Mobile Police Department and will further order that the dismissal of the Plaintiff and anything pertaining thereto be expunged from the Plaintiff's employment record.

WHEREFORE, the Plaintiff demands Judgement against the Defendants separately and severally in the amount of $5,000,000.00.

FOURTH CAUSE OF ACTION

I.

The Plaintiff incorporates herein all the allegations of paragraphs I through IV of the First Cause of Action.

II.

From the period of September 8, 1983 through the Plaintiff's termination by the Defendant City of Mobile October 18, 1983, the Defendants, willfully, or so recklessly as to equate to willfulness and by their extreme and outrageous conduct in attempting to and terminating the Plaintiff for his exercise of his constitutional right of free speech, did intentionally or recklessly cause severe emotional distress to the Plaintiff by having him wrongfully dismissed from the Mobile Police Department and permanently damaging the Plaintiff's good name and reputation.

III.

The Plaintiff prays that this Court will award to the Plaintiff compensatory damages and punitive damages suffered by the Plaintiff by virtue of the Defendants' commission of the tort of outrage.

WHEREFORE, the Plaintiff demands Judgement against the Defendants in the amount of $5,000,000.00.

FIFTH CAUSE OF ACTION

I.

The Plaintiff incorporates herein all the allegations of paragraph I through IV of the First Cause of Action.

II.

The Plaintiff alleges that from September 8, 1983, through October 18, 1983, all of the Defendants other than the Defendant City of Mobile intentionally and willfully interfered with the Plaintiff's employment with the Defendant City of Mobile by causing the Plaintiff to be terminated from his employment for exercising his right of free speech under the First Amendment to the Constitution of the United States in attempting to prosecute the Defendant Galanos for a DUI charge occurring on September 7, 1983.

III.

The Plaintiff prays that the Court will award to the Plaintiff damages for the intentional interference by the Defendants other than the City of Mobile with the Plaintiff's employment with the City of Mobile and will award to the Plaintiff compensatory damages including lost wages and future lost wages.

WHEREFORE, the Plaintiff demands Judgement against all Defendants other than the City of Mobile in the amount of $5,000,000.00 including compensatory and punitive damages.

Dated this 14 day of August, 1984.

KILBORN & GIBNEY
Post Office Box 1904
Mobile, Alabama 36633

/s/ VINCENT F. KILBORN III
VINCENT F. KILBORN III

PLAINTIFF RESPECTFULLY DEMANDS TRIAL BY JURY

The Defendants may be served at the following addresses:

The City of Mobile
City Hall
111 S. Royal Street
Mobile, Alabama 36602

Winston J. Orr
Lester Hargrove
Charles S. Summers
Bernard Henebry
Robert P. Larison
Mobile Police Department
51 Government Street
Mobile, Alabama 36602

Chris N. Galanos
Mobile County Courthouse
Government Street
Mobile, Alabama 36602

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

84-0951-C-S

WILLIAM H. McGILL ,

Plaintiff,

versus

CITY OF MOBILE, et al.,

Defendants.

PRE-TRIAL ORDER

A pre-trial conference was held in this case on the 23rd day of April, 1986, pursuant to Rule 16 of the Federal Rules of Civil Procedure, as a result of which the following proceedings were held and action was taken:

1. **Jurisdiction**.

Plaintiff claims jurisdiction pursuant to 28 U.S.C. §§1331 and 1343. By Order of this Court dated September 13, 1985 this Court denied the Defendant City of Mobile's Motion for Summary Judgment based upon collateral estoppel or *res judicata* under 28 U.S.C. §1738. See, Recommendation of Magistrate dated December 20, 1984. By Order of this Court dated September 12, 1985 this Court denied Defendant Galanos' Motion to Dismiss on the basis of prosecutorial immunity. See, Recommendation of Magistrate dated December 20, 1984.

Defendants deny that this Court has jurisdiction pursuant to those code sections for the reason that there is no 42 U.S.C. § 1983 cognizable cause of action, and plaintiff has no direct action under the Constitution.

2. **Parties and Trial Counsel.**

The parties before the court are correctly named as set out below and the designated trial counsel are set out below:

Plaintiff William H. McGill - Vincent F. Kilborn, III;

Defendants, City of Mobile, Winston J. Orr, Lester Hargrove and Charles S. Summers - Roderick P. Stout and James B. Rossler;

(Defendants Bernard Henebry and Robert P. Larison are deceased and have been dismissed pursuant to Rule 25);

Defendant, Chris N. Galanos - Davis Carr.

3. **Pleadings.**

The following pleadings (with modifications contained in this order) have been allowed:

Complaint;

Answer of Defendants, City of Mobile, Winston J. Orr, Lester Hargrove, Charles S. Summers; and

Answer of Chris N. Galanos.

4. **Agreed Facts.**

The following facts are established by admissions in the pleadings of stipulation of all parties:

1. From July 6, 1971 through October 8, 1983, McGill was at all times a policeman employed by the police department of the City of Mobile.

2. The City of Mobile is a municipal corporation and at all times was a municipality located within the State of Alabama.

3. Winston J. Orr was at all times relevant hereto the Chief of Police of the City of Mobile and was plaintiff's ultimate superior within the Mobile Police Department, plaintiff's place of employment.

4. Orr was at all times relevant hereto acting as an agent, servant, or employee of the City of Mobile.

5. Charles S. Summers was at all times acting as an agent, servant, or employee of the City of Mobile as a Captain in the Patrol Division of the Mobile Police Department.

6. Bernard Henebry and Robert P. Larison were originally sued in the complaint, but have died and no substitution has been filed. Hence, they are no longer parties to this litigation.

7. Lester Hargrove was at all times acting as an agent, servant or employee of the City of Mobile as a Sergeant of the Mobile Police Department.

8. Chris N. Galanos was at all times relevant hereto the District Attorney for Mobile County, Alabama.

9. On the night of September 7, 1983, while plaintiff was on patrol duty, he detained Galanos. The next morning plaintiff attempted to obtain a warrant for the arrest of Galanos.

10. *September 9, 1983*: Orr sent plaintiff a pre-disciplinary action notice, regarding the contemplated disciplinary action of dismissal for plaintiff for reasons set forth in the notice. A Bench Book is filed herewith for convenience of the Court, and a copy of this notice is in the Bench Book denominated Exhibit 1. The disciplinary hearing was scheduled for September 10, 1983 at 5:05 p.m.

11. *September 9, 1983*: Hargrove, as Sergeant of the Internal Affairs Division, wrote Orr regarding the Hammac incident. Bench Book Exhibit 2.

12. *September 9, 1983*: Summers, Henebry and Larison wrote Orr recommending the termination of plaintiff. Bench Book Exhibit 3.

13. *September 12, 1983*: Orr wrote Mayor Doyle, concurring in the recommendation of Summers, Henebry and Larison to terminate plaintiff. Bench Book Exhibit 4.

14. By letter dated September 12, 1983, Mayor Doyle on behalf of the City Commission wrote a letter of termination to the plaintiff which included the Galanos incident. Bench Book Exhibit 5.

15. *September 12, 1983*: Mike Rowland, as Corporal of the Internal Affairs Division wrote Orr regarding Internal Affairs' investigation of the Galanos matter. Bench Book Exhibit 6.

16. *September 13, 1983*: Hargrove, as Sergeant of the Internal Affairs Division, wrote Orr regarding the K-Mart incident. Bench Book Exhibit 7.

17. *September 13, 1983*: Sergeant James West of the Internal Affairs Division wrote Orr regarding the K-Mart, Hammac and Galanos matters. Bench Book Exhibit 8.

18. *September 13, 1983*: Mayor Doyle on behalf of the City Commission wrote plaintiff, terminating his employment effective September 13, 1983. Bench Book Exhibit 9.

19. *October 7, 1983*: Mayor Doyle on behalf of the City Commission wrote plaintiff, rescinding plaintiff's termination of September 13, and providing a pre-disciplinary action notice. A copy of this notice went to plaintiff's attorney, Lee L. Hale. Plaintiff was notified of the proposed disciplinary action, and the proposed reasons for that action. The pre-disciplinary hearing was

noticed for October 11, 1983 at 3:00 p.m. Bench Book Exhibit 10.

5. **Plaintiff's Theories of Recovery.**

1. The First Cause of Action alleges that McGill's right to prosecute the Defendant Galanos for a crime committed in his presence, including the right to sign a warrant and testify in pursuit of the warrant, was violated by the Defendants' firing of the Plaintiff. This right was protected by the First and Fourteenth Amendment to the Constitution of the United States under the right of free speech. Under the First Amendment, McGill could not be punished or retaliated against by the Defendants for his exercise or threaten to exercise of free speech. The Complaint also alleges that not only was the Plaintiff's exercise of free speech protected by the First Amendment but the Plaintiff was also protected by various State Statutes which prohibited the Defendants from obstructing justice or otherwise interfering with a police officer such as McGill in the carrying out of his duties. McGill's attempt to exercise his right of free speech was a substantial and motivating cause of his dismissal from his public employment as a police officer. Damages are claimed under 42 U.S.C. §1985(2), which provides a cause of action against two or more persons who "conspire for the purpose of impeding, hindering, or obstructing, or defeating, in any manner, the due course of justice in any state . . . , with intent to deny any citizen equal protection of the laws . . . ."

2. The Second Cause of Action alleges that the Plaintiff was denied a property right in his public employment without due process of law in violation of 28 U.S.C. §1983.

3. The Third Cause of Action alleges that the Plaintiff was deprived of his liberty interest without due process of law and that the Plaintiff was terminated for attempting to

prosecute the Defendant Galanos all in violation of 28 U.S.C. §1983.

4. The Fourth Cause of Action alleges the Tort of Outrage in that the Defendants willfully, and by their extreme and outrageous conduct attempted to terminate Plaintiff for his exercise of his Constitutional right to free speech.

5. The Fifth Cause of Action alleges an intentional interference with the Plaintiff's employment.

6. The Plaintiff does not contend that race was a factor in Plaintiff's termination.

7. By Order of September 13, 1985 the Court has already ruled that 28 U.S.C. §1738 does not bar this lawsuit.

8. The Defendant Galanos does not have prosecutorial immunity in that although the Defendant Galanos was the District Attorney of Mobile County at the time, his actions were not within the scope of his duties as prosecutor but were rather in the nature of an abuse of his prosecutorial position by using it for personal benefit. See, this Court's Order dated September 12, 1985 and Recommendation of Magistrate dated December 20, 1984.

6. **Plaintiff's Contentions.**

1. On the night of September 7, 1983, McGill attempted to arrest and prosecute Galanos for DUI.

2. On the following morning September 8, 1983 (within twelve hours) Galanos was in the Chief of Police Winston Orr's office wanting the Internal Affairs investigation and McGill fired.

3. Within thirty-six hours of the attempted arrest and on September 9, 1983, McGill received his Notice of Pre-Disciplinary Hearing with the Galanos Incident being one of three incidents mentioned.

4. The Notice falsely stated that the Galanos complaint had been fully investigated and found to be sustained when in fact the investigation had just begun. The Notice falsely stated the K-Mart and Hammac incidents had been fully investigated.

5. On September 10, 1983, the Pre-Disciplinary Hearing was held and the complaints against McGill including the Galanos, K-Mart and Hammac incidents were sustained.

6. On September 12, 1983 Mike Rowland, the investigating officer for the Department of Internal Affairs, wrote Winston Orr to the effect that the Galanos arrest incident was not justification for firing McGill, Rowland having found that McGill had acted properly.

7. On September 12, 1983, Orr wrote Police Commissioner Robert Doyle stating that the September 10, 1983 Pre-Disciplinary Hearing had been held and that the complaints against Officer McGill – the Galanos, K-Mart, and Hammac incidents – had been sustained and recommended that McGill be fired.

8. September 13, 1983, McGill received his letter of termination based upon the September 10, 1983 Pre-Disciplinary Hearing with the K-Mart and Hammac incidents included but the Galanos incident conspicuously left out.

9. Galanos wanted McGill terminated or disciplined because as the Grand Jury found he mistakenly thought McGill was part of some great conspiracy to discredit him with regard to the Auditorium investigation.

10. Chief Orr and Galanos put pressure on Rowland to sustain Galanos' complaint and have McGill fired.

11. McGill was terminated because Galanos wanted McGill terminated even though the Galanos Incident was omitted from McGill's September 13, 1983 Termination Letter.

12. Mobile Police Department through Chief Orr prohibited McGill from signing a warrant against Galanos and specifically informed him not to sign a warrant and not to say anything to the Alabama Attorney General Charles Graddick about the incident.

13. The Defendant Galanos was in fact using drugs, probably Dexedrine, on the night of September 7, 1983. The Defendant has been treated extensively in the past for drug abuse and the Defendant's DUI charge for which the Mobile County Grand Jury indicted Galanos was settled on an agreement that the DUI charge would be dismissed in return for Galanos obtaining treatment for his drug abuse.

14. The City of Mobile's second termination of McGill October 18, 1983 was a reenactment of the first termination because of "mistakes" made by the City in the first termination letter. McGill's September 13, 1983 hearing was so fraught with violations of due process of law and free speech that the City legal department recommended to the Defendant City that the termination be rescinded and that a second more sanitized version be held.

15. Commissioner Greenough refused to go along with the second termination because the Galanos Incident was obviously the reason for McGill's termination even though the second termination did not state it.

16. Regardless of the validity of any other complaints by the City of Mobile against Officer McGill, the Galanos Incident was the straw that broke the camel's back resulting in McGill being terminated. It is not necessary for a Plaintiff in a §1983 case to prove that the protected conduct was the "sole motive" for the termination. It is only necessary that the Plaintiff prove that a "substantial" or "motivating" factor in his termination was the protected conduct.

17. A special Mobile County Grand Jury exonerated McGill by (a) indicting Galanos as a result of the September 7, 1983 incident, (b) finding that McGill was not a part of any conspiracy as alleged by Galanos, and (c) exonerating McGill's attempt to arrest Galanos. This proves McGill's course of action in arresting and trying to prosecute Galanos was correct and the interference with it was improper.

18. The Plaintiff's protected activities were (1) free speech, and (2) a property right and liberty interest in his employment. The evidence is clear that the Galanos Incident was a motivating reason for McGill's dismissal and thus, violation of his protected interest. Mike Rowland, the Internal Affairs Investigating Officer, of the Galanos complaint will testify that he was pressured by the Defendant Orr to sustain the Galanos complaint, that McGill was terminated because Galanos wanted him terminated, and Galanos' motivation for all of this was his paranoia about a phantom conspiracy.

19. The Defendants violated the Plaintiff's due process rights in that the Defendants' conduct in firing the Plaintiff was arbitrary, unreasonable and capricious.

20. The Plaintiff's theories of recovery are more fully stated in the Plaintiff's briefs filed January 24, 1986, November 13, 1984 and September 12, 1984.

21. The Plaintiff's claim is not precluded under 28 U.S.C. §1738 as per the facts set out in the Magistrate's December 20, 1984 Recommendation on this point. As noted by the Magistrate (a) Mobile County Personnel Board specifically noted that it made no decision based upon the incident, (b) the Personnel Board upon the City's insistence specifically refused to allow the Plaintiff to present evidence on the incident, (c) the Defendants' retaliatory motivation arising from the incident was not an issue litigated in the Personnel Board action, (d) the Personnel Board is not a Defendant here, and (e) the Defendants brought the charges to the Personnel Board in the first instance for retaliatory purposes.

7. **Defenses.**

1. Plaintiff has no first amendment right to arrest anyone.

2. The Galanos matter was not a factor in the decision to terminate plaintiff.

3. There is no racially discriminatory animus.

4. Res judicata or collateral estoppel bars this lawsuit (28 U.S.C. §1738).

5. Due process was afforded.

6. The matters alleged in this complaint are more properly the subject of a compulsory claim in the state court proceedings.

7. Plaintiff failed to exhaust state remedies.

8. Plaintiff fails to state a claim for any and all of his alleged theories, and specifically including a tort of outrage.

9. All defendants had good faith immunity.

10. There is no 42 U.S.C. §1983 cause of action in this case because there is no established state procedure, or custom, policy or practice which led to the deprivations of which plaintiff complains.

11. Plaintiff has no protected liberty interest.

12. With regard to the defendant Galanos, he either was not acting under color of law, or if he was, he had prosecutorial immunity.

8. **Defendants' Contentions.**

1. Defendants believe that the recitation of agreed facts supplement the defenses outlined above. Additionally, defendants have filed briefs in support of motions for summary judgment which have elaborated, at length, on these contentions. Defendants feel there is a burden on plaintiff to prove there is a first amendment right to arrest, which has not been done. There is absolutely no evidence of any racially discriminatory animus as required by 42 U.S.C. §1985.

2. It is clear that plaintiff was afforded process through the state court proceedings. Plaintiff simply is not satisfied with that process, and questions the "real" motivations.

Plaintiff was given notice, an opportunity to be heard, counseled, and the right to put on evidence. Plaintiff had a hearing before Gordon Blackwell, a hearing before the Personnel Board, and a review of that hearing by a Mobile County Circuit Judge. Plaintiff should not be entitled to re-litigate his termination.

3. There is no established state procedure, or custom policy or practice which is required to sustain a 42 U.S.C. §1983 claim.

4. With regard to Galanos, if he was acting as a private citizen and not as a District Attorney, then there is no color of law and a 1983 cause of action against him will not lie. If Galanos was acting in his capacity as District Attorney, then he had prosecutorial immunity.

9. **Witnesses**.

The parties have identified below the names and addresses of the following witnesses whose testimony can reasonably be anticipated at the trial of this action.

John Coleman, Esq.
801 Van Antwerp Building
Mobile, Alabama 36602

Ira DeMent, Esq.
Special Assistant Attorney General
Post Office Box 4163
Montgomery, Alabama 36101

Winston J. Orr
6275 Lausanne Drive North
Mobile, Alabama

Charles S. Summers
c/o Mobile Police Department
Mobile, Alabama

Lester Hargrove
c/o Mobile Police Department
Mobile, Alabama

Mike Rowland
c/o Mobile Police Department
Mobile, Alabama

James West
c/o Mobile Police Department
Mobile, Alabama

Phillip Garrett
c/o Mobile Police Department
Mobile, Alabama

Pete Hollifield
c/o Mobile Police Department
Mobile, Alabama

Mike Singleterry
c/o Mobile Police Department
Mobile, Alabama

A. E. Allen
c/o Mobile Police Department
Mobile, Alabama

John Wynne
c/o Mobile Police Department
Mobile, Alabama

Lambert C. Mims
3008 Bryant Road
Mobile, Alabama

Robert Doyle
c/o City of Mobile
Mobile, Alabama

William Garrick
c/o Mobile Police Department
Mobile, Alabama

Mr. & Mrs. Nick Galanos
5717 Knights Court
Mobile, Alabama

Mr. & Mrs. Chris Galanos
c/o Mobile County District Attorney's Office
Mobile, Alabama

Effie Diamond
Lois Helmer
c/o City of Mobile
Mobile, Alabama

Gordon Blackwell
c/o City of Mobile
Mobile, Alabama

Willie Nobles
Edith Vaughan
James K. Huffstetler
James A. McPherson
c/o Mobile Personnel Board
Mobile, Alabama

Lee L. Hale, Esq.
P. O. Box 495
Mobile, Alabama 36601

Bill Lauten
City of Mobile
Mobile, Alabama

Mylan Engle
P. O. Box 1045
Mobile, Alabama 36633

Dan Millis
c/o K-Mart
4665 Airport Boulevard
Mobile, Alabama

Barbara Curry
c/o First National Bank Overlook
Mobile, Alabama

Douglas Hammac
c/o Hammac's Garage & Wrecker Service
2730 Highpoint Boulevard
Mobile, Alabama

Robert Smith
c/o Mobile Police Department
Mobile, Alabama

Dianne Smith
c/o Mobile Police Department
Mobile, Alabama

John Phillips
c/o Mobile Police Department
Mobile, Alabama

Ronald Mair
c/o Mobile Police Department
Mobile, Alabama

Bobby Westbrook
c/o K-Mart
4665 Airport Boulevard
Mobile, Alabama

Obie Singletary
c/o Mobile Police Department
Mobile, Alabama

Shelby J. Robbins
c/o Mobile Police Department
Mobile, Alabama

Frances W. McGill
Mobile, Alabama

10. **Type of Trial.**

This is a jury trial.

11. **Standard Pre-Trial Procedures.**

The Standard Pre-Trial Procedures and any modifications thereto on exhibit "A" to this Pre-trial Order, are adopted as

part of this Order. This Pre-trial Order shall be binding on parties unless modified by further order for good cause shown.

DONE this 23rd day of April, 1986.

EMMETT R. COX
United States District Judge

VINCENT F. KILBORN, III
Attorney for Plaintiff

JAMES B. ROSSLER
Attorney for Defendant, City of Mobile, Winston J. Orr, Charles S. Summers and Lester Hargrove

/s/ DAVIS CARR
DAVIS CARR
Attorney for Defendant, Chris Galanos

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NO. 84-0951-C-S

WILLIAM H. MC GILL,

Plaintiff,

versus

CITY OF MOBILE, et al,

Defendants.

Filed November 7, 1985

MOTION TO QUASH NOTICES OF DEPOSITION

Comes now CHRIS GALANOS (Galanos), a defendant in the above styled cause, and moves the court for an order quashing the notices of deposition filed by plaintiff for the depositions of Dr. S. N. Rumpanos and Dr. William H. Rudder, said depositions being noticed for November 26, 1985, a copy of said notices being attached hereto as Exhibits A and B. As grounds therefore, Galanos says as follows:

1. Each of the deponents mentioned hereinabove are medical doctors who, prior to the occurrence made the basis of plaintiff's complaint, rendered some treatment to Galanos.

2. Other than the fact of having rendered treatment to Galanos, the deponents named have no knowledge whatsoever concerning the occurrence made the basis of plaintiff's complaint.

3. The treatment said deponents rendered to Galanos is irrelevant and immaterial to any of the issues raised by the pleadings in this action, nor will such evidence reasonably lead to any discoverable evidence and, therefore, the subject of the testimony of said deponents is beyond the scope of Rule 26, Federal Rules of Civil Procedure.

4. The sole purpose of the taking of the depositions of the two above named deponents is to harass Galanos, or cause Galanos embarassment.

5. The testimony of said physicians as to their treatment of Galanos is privileged to the extent that it constitutes psychiatric or psychological counseling.

/s/ NATHAN FRIEDLANDER
NATHAN FRIEDLANDER

OF COUNSEL:
MARR AND FRIEDLANDER, P.C.
POST OFFICE BOX 8548
MOBILE, ALABAMA 36608

CERTIFICATE OF SERVICE

I, Nathan Friedlander, hereby certify that on the 6th day of November 1985 I served the foregoing motion on counsel of record in this cause by mailing a copy by United States mail, first class postage prepaid to Vincent F. Kilborn III, Post Office Box 1904, Mobile, Alabama 36633; Roderick P. Stout, Post Office Box 2214, Mobile, Alabama 36652; and, William A. Kimbrough, Jr., Post Office Box 2821, Mobile, Alabama 36652.

/s/ NATHAN FRIEDLANDER
NATHAN FRIEDLANDER

Attachments: Exhibits A & B

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 84-0951-C-S

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, et al,

Defendants.

ORDER

The motion of Plaintiff to compel document production from Defendant Galanos is DENIED. Defendant has filed a response stating that he is not in possession of the requested documents. Though the obligation to produce under Rule 34 extends to documents within the control of the party, there is no basis in the record for the conclusion that Defendant in fact controls the disposition of the documents.

The motions to compel testimony from deponents Drs. William H. Rudder and Socrates N. Rumpanos are GRANTED.

This is an action brought under 42 U.S.C. §§1983 and 1985. The controlling substantive legal principles are established by federal law. Privilege, therefore, is governed by the first sentence of Rule 501, FED.R.EVID., which makes privilege a matter of federal common law. Inasmuch as the second sentence of Rule 501 is not applicable, Alabama's privilege rules do not control, though they may be a useful

reference in determining what privileges the common law provides.

The federal courts have generally been quite restrictive in recognizing testimonial privileges. *See Trammel v. United States*, 445 U.S. 40, 50 (1980); *American Civil Liberties Union of Mississippi v. Finch*, 638 F.2d 1336, 1344 (5th Cir. 1981). The federal common law has not recognized a general physician-patient privilege. *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983); *United States v. Meagher*, 531 F.2d 752 (5th Cir. 1976); *United States v. Harper*, 450 F.2d 1032 (5th Cir. 1971). There is no compelling reason shown in this case to deviate from that authority and create a general physician-patient privilege.

The precise issue in this case relates to a physician's testimony regarding treatment of a claimed drug dependency and his prescription of controlled substances. The claimed privilege is therefore akin to that which would have been recognized in proposed Evidence Rule 504, which was not enacted by Congress. The majority of federal decisions appear to reject the "psychotherapist privilege" which would have been created by proposed Rule 504. *See In re Doe*, 711 F.2d 1187, 1193 (2d Cir. 1983), and cases cited therein. In *United States v. Lindstrom*, *supra*, and *United States v. Meagher*, *supra*, the Courts declined to recognize a privilege in "psychotherapist" contexts. The Magistrate finds no basis for a claim of federal common law privilege here.

The testimony of Drs. Rudder and Rumpanos pursuant to this Order shall be subject to the same confidentiality requirements set forth in the Order of November 21, 1985.

DONE this 27th day of December, 1985.

/s/ Patrick H. Sims
Patrick H. Sims
UNITED STATES MAGISTRATE

December 27, 1985

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CASE NUMBER: 84-0951-C-S

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, et al.,

Defendants.

OBJECTION TO RECOMMENDATION
OR ORDER OF MAGISTRATE

Defendant, Chris Galanos, objects to the recommendation or order of the Magistrate dated December 27, 1985 with regard to the depositions of this defendant's treating physicians and requests a hearing before the district judge.

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Attorneys for Defendant,
Chris Galanos

/s/ DAVIS CARR
DAVIS CARR
Post Office Box 123
Mobile, Alabama 36601

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 2nd day of January, 1986, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing a copy of same by United States Mail, properly addressed and first class postage prepaid.

/s/ DAVIS CARR
DAVIS CARR

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

84-0951-C-S

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, et al.,

Defendants.

Filed February 3, 1986

AMENDED MOTION TO QUASH DEPOSITIONS
OF DR. RUMPANOS AND DR. RUDDER,
AND MOTION FOR PROTECTIVE ORDER

Defendant, Chris Galanos amends the previously filed motions to quash the depositions of Dr. Rumpanos and Dr. Rudder, which depositions were attempted by counsel for plaintiff to be taken, and defendant further files this motion for protective order, for the following separate and several reasons:

1. This is a case by a former police officer alleging, in essence, that his right of free speech was violated by defendants, and that defendants unlawfully conspired to deprive plaintiff of his employment. Counsel for plaintiff wishes to depose two physicians who treated this defendant, because it is plaintiff's "belief" that Galanos was taking controlled substances at the time of his arrest.

2. Whether Galanos was taking medication on the evening plaintiff detained this defendant is not relevant or material to the issues raised by plaintiff's complaint; namely, whether this defendant unlawfully conspired with others to deprive plaintiff of constitutionally protected rights. Even further, assuming that in fact, Galanos was taking prescribed medication at the time, that that would not be admissible to show that, at the time and place plaintiff detained Galanos, Galanos had abused the medication.

3. Allowing the testimony of Drs. Rudder and Rumpanos could and/or would violate Galanos' right of privacy as recognized in United States Supreme Court decisions, and would further violate Galanos' rights protected by the first, fourth, fifth, ninth and tenth amendment rights.

4. Rule 402 of the Federal Rules of Evidence provides that all relevant evidence is admissible, except as otherwise provided by the constitution, by act of Congress, these rules, or by "other rules prescribed by the Supreme Court pursuant to statutory authority." In this regard, first, Rule 501 of the Federal Rules of Evidence provides that, with respect to privileges, principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience shall govern such privileges. In civil actions with respect to an element or claim as to which state law supplies the rule of decision, however, privileges shall be determined in accordance with state law. Further while Congress did not enact the specific proposed rules addressing privileges, "the general mandate of Rule 501 was substituted by Congress for a set of privilege rules drafted by the Judicial Conference Advisory Committee on Rules of Evidence and approved by the Judicial Conference of the United States and by this Court." *Trammel v. United States*, 445 U.S. 40, 47 (1980). Proposed Rule 504 would have provided a privilege for psychotherapist/patient communications. See e.g.,

56 F.R.D. 240, which notes that "many states have by statute created the privilege." *Id.* at 241.

5. Plaintiff alleges that Galanos was guilty of drug abuse, and that is the avowed purpose of taking these two depositions. Without agreeing that there was such abuse, but for the sake of argument, Federal law recognizes the importance of confidentiality of patients seeking alcohol and drug abuse. 42 U.S.C. §4582(a); 42 C.F.R. §2.2. This federal privilege would apply to any individual who has applied for or been given diagnosis or treatment for drug abuse or alcohol abuse. 42 C.F.R. §2.11(i), and the prohibition of the disclosure of information about an alcohol or drug abuse patient covers *all* information about patients, including their "attendance or absence, physical whereabouts, or status as patients." 42 C.F.R. §2.13(c). The act is so strong that a hospital or physician served with a subpoena for patient information covered by the regulations may not identify the act which provides confidentiality, because by such a citation, the patient would be identified as a drug abuser or alcohol abuser, and that identification would violate the statute 42 C.F.R. §2.13-1(d).

6. Alabama State Law further recognizes the privilege with regard to communications between a patient and his or her psychiatrist or psychologist. Alabama Code §34-26-2 (1975). Further, medical doctors who reveal confidences provided by patients are subject to civil liability. *Horne v. Patton*, 291 Ala. 701, 287 So. 2d 824 (1973).

7. It would violate principles of comity and federalism to recognize the state privilege in state court, and in diversity cases, but to disallow the avowed policy of the sovereign State of Alabama by the fortuitous event that the plaintiff is seeking a claim based on a federal cause of action. See cases cited in accompanying letter brief.

8. Assuming that the court is of the opinion that such information may be relevant, and not privileged, Rule 403 of the Federal Rules of Evidence provides that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Given the issues in this case as framed by the plaintiff's complaint, the question of Galanos' medical treatment would certainly be a classic illustration of such unfair prejudice, confusion of issues, and danger of misleading the jury. Whether Galanos was receiving such treatment had nothing to do with plaintiff's termination, and whether the defendants violated plaintiff's constitutional rights in that termination.

9. Finally, Rule 26(c) of the Federal Rules of Civil Procedure provides that the Court may grant a protective order when justice requires to protect a party from annoyance, embarassment, oppression. As set forth hereinabove, such a protective order denying the testimony sought is justified in this case.

This motion is accompanied by a letter brief to the Court, which should be read for a full explanation in support of the above arguments. For the foregoing reasons, the Court should not allow the deposition testimony of Dr. Rumpanos and Dr. Rudder.

HAND, ARENDALL, BEDSOLE,
GREAVES & JOHNSTON
Attorneys for Defendant,
Chris Galanos

/s/ DAVIS CARR
DAVIS CARR
Post Office Box 123
Mobile, Alabama 36601

ORAL ARGUMENT REQUESTED

REFERRED TO JUDGE COX
For Ruling or Appropriate Action
Date: February 5, 1986

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 84-0951-C

WILLIAM H. McGILL,

Plaintiff,

versus

CITY OF MOBILE, et al.,

Defendants.

MEMORANDUM OPINION

This matter is before the court on the defendant Chris Galanos' objection (Doc. #52) to the Magistrate's order dated December 27, 1985 (Doc. #48) granting the plaintiff's motion to compel testimony from deponents Dr. William H. Rudder (Doc. #46) and Dr. Socrates N. Rumpanos (Doc. #47). Also before the court is the defendant Chris Galanos' amended motion to quash depositions of Dr. Rumpanos and Dr. Rudder and a motion for protective order (Doc. #61). The defendant's objection to the Magistrate's order will be treated as a motion for reconsideration. It is,

ORDERED that the motion is GRANTED.

Upon reconsideration the court is not convinced that the Magistrate's order is clearly erroneous or contrary to law. 28 U.S.C. §636(b)(1)(A) (1985). The court, therefore, declines to overrule or modify the order of the Magistrate.

The amended motion to quash depositions and motion for protective order (Doc. #61) are hereby DENIED.

DONE this 25 day of June, 1986.

/s/ EMMETT R. COX
EMMETT R. COX
UNITED STATES DISTRICT JUDGE

RECEIVED June 25, 1986

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7628

IN RE:

CHRISTOPHER N. GALANOS,

Petitioner.

Filed October 3, 1986
Miguel J. Cortez, Clerk

On Petition for Writ of Mandamus to the United States District Court for the Southern District of Alabama

---

Before GODBOLD, VANCE and JOHNSON, Circuit Judges

BY THE COURT:

The petition for writ of mandamus is denied.

APPENDIX I

UNITED STATES DISTRICT COURT
Southern District of Alabama
123 United States Courthouse
Mobile, Alabama

JOHN V. O'BRIEN
CLERK

MAILING ADDRESS:
P.O. Box 2625
MOBILE, ALA. 36652
205-690-2371
FTS
537-2371

OCTOBER 15, 1986
(Date)

Mr. Vincent F. Kilborn, III

Mr. W. A. Kimbrough, Jr.

Mr. Davis Carr

Mr. James B. Rossler

RE: CIVIL ACTION NO. 84-051-AH
WILLIAM H. McGILL VS.
CITY OF MOBILE, ET AL

Dear Counsel:

This is to advise each of you that the above styled and numbered case has been transferred from the docket of **JUDGE EMMETT R. COX** and is now assigned to the docket of **JUDGE ALEX T. HOWARD, JR.**

If this case is presently set on a motion docket, status conference, for a preliminary pre-trial conference, final pre-trial conference or trial, these settings are CANCELLED.

If this transfer is made prior to the date that Judge Howard is sworn in, any emergency motions or other matters requiring immediate action will be handled by Judge Cox.

To insure that your pleadings are referred to the proper Judge with as little delay as possible, please use the suffix "**AH**" after the case number on all pleadings.

Very truly yours,

JOHN V. O'BRIEN, CLERK

BY - /s/ William E. Taylor
Deputy Clerk

Copy to:

Court File

No. 86-1099

(2)

Supreme Court, U.S.
FILED
FEB 13 1987
JOSEPH F. SPANIOL, JR
CLERK

IN THE
Supreme Court of the United States

October Term, 1986

CHRISTOPHER N. GALANOS,
Petitioner,

versus

HONORABLE ALEX T. HOWARD, JR.,
Respondent.

SUPPLEMENTAL INDEX
TO PETITION FOR A WRIT OF CERTIORARI

DAVIS CARR
Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

ATTORNEY FOR PETITIONER
Christopher N. Galanos

Counsel of Record

30 pp

THE STATE OF ALABAMA

JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 1986-87

Ex parte: Dr. William H. Rudder

PETITION FOR WRIT OF MANDAMUS
OR IN THE ALTERNATIVE
PETITION FOR WRIT OF PROHIBITION

85-871

(Re: Dr. William H. Rudder

versus

Universal Communications Corporation, etc., et al.)

SHORES, JUSTICE.

This is a petition for writ of mandamus or, in the alternative, petition for writ of prohibition. The petition arises in the context of a defamation case in which Dr. William H. Rudder sued Universal Communications Corporation (owners of WALA-TV in Mobile) and Glenda Webb (an investigative reporter for WALA). Dr. Rudder, a Mobile psychiatrist, filed a libel suit and invasion of privacy lawsuit against WALA and Webb, based upon television broadcasts on February 13 and 14, 1984, that dealt with the subject of abusive prescriptive

drug practices. Part of those broadcasts included reports on an investigation of Dr. Rudder and another Mobile physician, Dr. Socrates Rumpanos, by the Alabama State Board of Medical Examiners relative to their prescribing dexedrine to Mobile County District Attorney, Chris Galanos. Dr. Rudder claims that these news stories defamed him and that his right of privacy was invaded, and he seeks $2 million in compensatory and punitive damages.

WALA and Webb filed a motion to have Dr. Rudder produce all of his medical or psychiatric records concerning the treatment of Galanos, including records relative to prescriptions he wrote for dexedrine for Galanos. Through his attorney, Galanos asserted his psychiatrist-client privilege under Code 1975, §34-26-2. Galanos had previously made a limited waiver of this privilege during the investigation of Dr. Rudder by the Board of Medical Examiners. Under the Board's own rules and regulations, Dr. Rudder's records that were used in its investigation are privileged and confidential and unavailable to the public. Galanos is not a party to this suit. Dr. Rudder refuses to turn over his records to WALA and Webb.

The trial court overruled Dr. Rudder's objection to the request for production and denied his motion for a protective order. The trial judge ruled that the documents in question are relevant and material to the defendants' defense of truth, that the psychiatrist-patient privilege gives way to the right grounded in the First Amendment to the United States Constitution, and that Galanos had waived any privilege he may have had concerning these records when he allowed their production to the State Board of Medical Examiners without first applying to the circuit court for a protective order.

Dr. Rudder seeks a writ of mandamus directed to the trial judge commanding him to vacate his order overruling Dr. Rudder's objection to defendants' request for production of documents and denying Dr. Rudder's motion for a protective order and commanding him to sustain Dr. Rudder's objection and grant his motion, or in the alternative, a writ of prohibition prohibiting him from overruling the objection and denying the motion. The documents in issue are Dr. Rudder's medical records pertaining to District Attorney Chris Galanos.

Petitioner Rudder contends that Galanos has not waived his privilege. We agree. Only the person entitled to claim an evidentiary privilege can waive that privilege by filing a lawsuit. See *Mull v. String*, 448 So.2d 952 (Ala. 1984). Galanos is not a party to the present lawsuit. Also, Galanos did not waive his privilege by consenting to Dr. Rudder's production of his medical records to the Board of Medical Examiners and testimony before the Board for the reason that the disclosures to the Board were themselves privileged and confidential communications. "Waiver does not result as to disclosures which are themselves privileged communications." *Jones on Evidence*, Vol. 3, §21:2, at 747 (6th ed. 1972).

Having determined that Galanos has not waived his privilege, we now must decide whether, under the facts of this case, the privilege should be recognized or disregarded.

Section 34-26-2, Ala. Code 1975, entitled *Confidential relations and communications between licensed psychologists and psychiatrists and their clients*, provides:

> "For the purpose of this chapter, the confidential relations and communications between licensed psychologists and licensed psychiatrists and clients are placed upon the same basis as those provided by law between

> attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

It is not disputed that the medical records, created during the psychiatrist-patient relationship, are included in the confidential relationship and are also privileged. See *Horne v. Patton*, 291 Ala. 701, 287 So.2d 824 (1973); 10 A.L.R. 4th 552 *Physician-Patient Privilege as Extending to Patient's Medical or Hospital Records* (1981).

Statutes such as §34-26-2 are intended to inspire confidence in the patient and encourage him in making a full disclosure to the physician as to his symptoms and condition, by preventing the physician from making public information that would result in humiliation, embarrassment, or disgrace to the patient, and are thus designed to promote the efficacy of the physician's advice or treatment. The exclusion of the evidence rests in the public policy and is for the general interest of the community. See 81 Am. Jur. 2d *Witnesses* §231 at 262 (1976); *Annot.*, 44 A.L.R. 3d 24 *Privilege, in Judicial or Quasi-judicial Proceedings, Arising from Relationship Between Psychiatrist or Psychologist and Patient* (1972).

> "[A] psychiatrist must have his patient's confidence or he cannot help him. 'The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. *** It would be too much to expect them to do so if they knew that all

> they say – and all that the psychiatrist learns from what they say – may be revealed to the whole world from a witness stand.' "

Taylor v. United States, 222 F.2d 398, 401 (D. C. Cir. 1955), quoting Guttmacher and Weihofen, *Psychiatry and The Law* (1952), p. 272.

The Alabama Rules of Civil Procedure recognize the importance of preserving confidential relationships and confidential information arising therefrom, by providing that privileged matters are not subject to discovery:

> "RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY.
>
> " . . . .
>
> " (b) ***Scope of discovery***. . . . [T]he scope of discovery is as follows:
>
> " (1) ***In General***. Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ." (Emphasis added)

McCormick on Evidence, §72 at 171 (1984), notes that evidentiary privileges do not aid in the ascertainment of truth, but are justified because they protect interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.

We also recognize that the discovery rules are to be broadly and liberally construed. *Cole v. Cole Tomato Sales, Inc.*, 293 Ala. 731, 310 So.2d 210 (1975), citing *Hickman v. Taylor*, 329 U.S. 495 (1947). This broad and liberal construction is intended to promote the philosophy of the rules, "which is to permit full discovery so as to save time, effort, and money and to expedite the trial and with a view of achieving justice for each litigant." *Van Buren v. Dendy*, 440 So.2d 1012, 1014 (Ala. 1983). "Modern instruments of discovery serve a useful purpose. . . . They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. . . . Only strong public policies weigh against disclosure." *United States v. Procter & Gamble Co.*, 356 U.S. 677, at 682-83 (1958). Thus, at issue in the present case are two competing interests: the public's interest in protecting the psychiatrist-patient privilege and the interest in not handicapping defendants in defamation cases in discovery efforts in order to prepare their defense.

As recognized in Rule 26(b) (1), supra, and in Rule 26(c), the right of discovery is not unlimited, and the trial court has the power to prevent its abuse by any party. *Van Buren v. Dendy*, citing *Assured Investors Life Ins. Co. v. National Union Associates, Inc.*, 362 So.2d 228 (Ala. 1978).

> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."

A. R. Civ. P., Rule 26(c).

Our research did not reveal the existence of any case raising the precise issue now before us – whether a news media defendant, in defense of an action for defamation brought by a psychiatrist (or other physician), has a right to discover that doctor's privileged medical records pertaining to one of his patients. *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 7 Cal. Rptr. 109, 354 P.2d 637 (1960), is, however, a somewhat analogous case.

In that case, an attorney brought an action against the defendant newspaper for libel based on an article it published which plaintiff claimed injured him in his professional reputation. The attorney contended that his professional reputation was good and that he had never been guilty of any misconduct. The newspaper sought discovery from the State Bar to ascertain if complaints, not resulting in any private or public discipline, had ever been filed, and whether any investigations of the plaintiff had ever taken place. The State Bar sought an order limiting discovery by excluding inquiry into information contained in the confidential files of the State Bar. It was urged that the matters sought to be excluded were privileged and that the public interest would suffer by disclosure.

The trial court granted the motion for a protective order. On petition for mandamus brought by the newspaper, the California Supreme Court held that the information sought by the defendant newspaper was relevant but privileged, as provided by California statute. The court cited a discovery statute similar to Alabama's Rule 26(b), supra, prohibiting discovery of privileged matters. The State Bar argued that the free communication of information on a privileged, confidential basis was necessary for the proper functioning of the disciplinary procedures. The Supreme Court agreed, stating that "in the case of complaints against members of the State Bar, it is essential to secure all possible information bearing

thereon, and necessarily much of the information can only be had upon the understanding that the informant and the information will be treated as confidential." *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d at 559, 7 Cal. Rptr. at 120, 354 P. 2d at 648. In upholding the trial court's protective order, the Court said: "In the interest of the public, the State Bar's need for secrecy outweighs the litigant's need for information." *Chronicle Publishing Co.*, supra, 54 Cal. 2d at 562, 7 Cal. Rptr. at 123, 354 P. 2d at 651.

The public interest is served by encouraging individuals to seek help and treatment for both mental and physical illness. Without the assurance of confidentiality, many individuals would resist seeking help, fearing the potentially humiliating and embarrassing exposure of their private lives. We recognize that both interests are important – the interest in preserving the psychiatrist-patient privilege and the interest in promoting full and thorough discovery. Under the facts of the instant case, the latter must yield to the former.

Defendants WALA and Webb argue that a third and paramount interest is involved – the right to free expression guaranteed by the First Amendment. The trial court agreed with defendants and denied Dr. Rudder's motion for protective order. The trial court held that "the psychiatrist-patient privilege gives way to the right grounded in the First Amendment to the United States Constitution." Defendants specifically contend that the First Amendment to the United States Constitution "grants a privilege to the media as a defense to libel actions of this sort," citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. _____, 106 S.Ct. 1558 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Furthermore, they argue that if they "are prohibited from getting Dr. Rudder's records concerning Mr. Galanos, then the privilege predicated upon the United States Constitution

is completely emasculated." Under the facts of the present case, we disagree. First, a brief review of *Hepps*, *Gertz*, and *Sullivan*, is in order.

The constitutional protection against liability for defamation enunciated in *Gertz* and *Sullivan* can be stated as follows: Where a plaintiff is a public official or a public figure, the media defendant will escape liability unless the plaintiff proves publication of defamatory falsehood with actual malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Gertz* held that private individuals were not required to show "actual malice" in a libel suit against the media, and that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[1] 418 U.S. at 347. The recent United States Supreme Court opinion in *Hepps* holds that a private figure plaintiff who seeks to recover damages against a media defendant for defamatory speech on a matter of public concern must also show that the statements at issue are false. The Court held that "the common law's rule on falsity – that the defendant must bear the burden of proving truth – must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." 475 U.S. (at ____), 106 S.Ct. at 1563.

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1 See *Fulton v. Advertiser Co.*, 388 So.2d 533 (Ala. 1980), *cert. denied*, 449 U.S. 1131, (1981), where this Court held that a private individual must prove "traditional malice," as distinguished from the *Sullivan*, "actual malice," in a libel suit against a media defendant. Traditional malice "may be shown by evidence of previous ill will, hostility, threats, rivalry, other actions, former libels or slanders, and the like . . . or by the violence of the defendant's language, the mode and extent of publication, and the like." *Fulton*, 388 So.2d at 538, quoting *Kenney v. Gurley*, 208 Ala. 623, 95 So. 34 (1923).

We recognize that the courts of this State are bound by the constitutional principles enunciated in these Supreme Court cases. In actions for defamation, there must be an initial determination by the trial judge in regard to the status of the allegedly defamed person as a public official, a public figure, or a private individual. *Fulton v. Advertiser Co.*, 388 So.2d 533 (Ala. 1980), *cert. denied*, 449 U.S. 1131, (1981). Furthermore, where it is determined that a private individual is alleging defamation, there must be a determination of whether the defamatory speech involves a matter of public concern. *Philadelphia Newspapers, Inc. v. Hepps*, supra. These determinations are questions of law for the trial judge. *Fulton*. These issues must be resolved first, because the manner of their resolution determines what elements of proof are necessary for recovery. *Mobile Press Register, Inc. v. Faulkner*, 372 So.2d 1282 (Ala. 1979), citing *New York Times Co. v. Sullivan*, supra.

Each of these cases from the United States Supreme Court speaks to the burden of proof in defamation cases. None of them extends to the media a constitutional right to information not otherwise available to others. Although one hears assertions of the "media's right to know," we have found no reference to a constitutional "right to know" in any decision of the Supreme Court of the United States. One state court has had occasion to address this point. The Supreme Court of Washington in *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P. 2d 673 (1982), affirmed, 467 U.S. 20 (1984), is instructive. That case involved a suit for defamation and invasion of privacy against a defendant newspaper. The newspaper challenged the trial court's granting of a protective order, sought by the plaintiff, on First Amendment grounds. The Supreme Court of Washington, in affirming the protective

order against a charge that it violated the First and Fourteenth Amendments, stated:

> "Under the federal constitution, persons engaged in the business or profession of publishing or otherwise communicating with the public are entitled to no greater protection than citizens who are not so engaged. Their right of access to information within the control of the government is the same. *Houchins v. KQED, Inc.*, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (access to jails); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (access to tapes not placed in evidence at trial); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) (access to prisons and inmates). *See Estes v. Texas*, 381 U.S. 532, 589, 85 S.Ct. 1628, 1663, 14 L.Ed.2d 543 (1965) (Harlan, J., concurring).
>
> "Nor is there any basis for holding that a publisher, when he is a party to litigation, enjoys a greater immunity from protective orders than do other litigants, as the defendants would have us hold. Neither the first and fourteenth amendments to the United States Constitution nor article 1, section 5 of our state constitution makes any distinction among citizens in conferring their protections."

Rhinehart v. Seattle Times Co., 98 Wash. 2d at 229-30, 654 P. 2d at 676.

While freedom of the press must be strongly defended, it does not include access to information not generally available to members of the public. See *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974). Information recognized as privileged is not available to the public. As previously discussed, there is an important societal interest in preserving the confidentiality of the psychiatrist-patient relationship. There may be instances where the media defendant would be allowed to discover privileged communications, but that case is not now before us.

We recognize the dilemma which WALA and Webb anticipate. The plaintiff will testify that the publication by them was false and they will be called upon to produce evidence to the contrary – the best of which is in the plaintiff's possession under a claim of physician/patient privilege. However, for the present, WALA and Webb have failed to show that any constitutional right has been violated by the retention of the privilege legislatively extended to Galanos's medical records, and they have also failed to demonstrate that they would be unduly handicapped in defending this lawsuit. To the contrary, representatives of WALA repeatedly stated that the broadcasts in issue were "backed up by facts," that "we made clear that everything we said was factual," and that "all the claims [made by WALA-TV] were substantiated with facts." Thus, defendants have acknowledged that they have other non-privileged evidence available to them to defend against Dr. Rudder's allegations.

The protection of a patient's and society's interest in preserving the confidentiality of the psychiatrist-patient relationship is of sufficient importance to generally warrant exclusion from discovery. However, this psychiatrist-patient privilege may not in all cases be an impenetrable shield. See, e.g., *D. v. D.*, 108 N.J. Super. 149, 260 A.2d 255 (1969), where the court observed that when the custody of children

was at issue, the welfare of the children was paramount to the rights of the parents to invoke a statutory privilege against the admission of psychotherapist-patient communications.

From the record before us, we cannot ascertain whether the trial court has determined that Dr. Rudder is a private or a public figure under *Fulton*, supra. Until it does so, we cannot state what elements of proof are necessary for his recovery, as delineated by *Hepps*, *Gertz*, and *Sullivan*. WALA and Webb contend that, assuming Dr. Rudder is a private individual (without conceding that he is), the broadcasts in issue were of public concern; if so, this fact, in accordance with *Hepps*, would cast on Dr. Rudder the burden of proving that the publications were false. We agree that the subject of the broadcasts is of public concern; therefore, Dr. Rudder's burden of proof is a heavy one, and it is one he must bear without the use of the medical records, because the privilege prevents him too from utilizing them.

The petition for writ of mandamus is granted, and the trial court is ordered to grant Dr. Rudder's motion for a protective order.

WRIT GRANTED.

Maddox, Jones, Almon, Beatty, and Adams, JJ., concur.

Torbert, C. J., and Houston and Steagall, JJ., dissent.

TORBERT, CHIEF JUSTICE (dissenting).

I must respectfully dissent. The defendants' First Amendment rights of freedom of speech and freedom of the press do conflict with the psychiatrist-patient privilege in this case, and I would hold that the defendants' constitutional rights outweigh this statutory privilege.

As the United States Supreme Court stated in *Connick v. Myers*, 461 U.S. 138, 145 (1983):

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the '"highest rung of the heirarchy [sic] of First Amendment values,"' and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)."

Speech of public concern is at the core of the First Amendment's protection and it is speech that "matters." *See Philadelphia Newspapers, Inc. v. Hepps*, [Ms. April 21, 1986] _____ U.S. _____, _____, 106 S.Ct. 1558, 1565 (1986).

The majority states, "Each of these cases from the United States Supreme Court speaks to the burden of proof in defamation cases. None of them extends to the media a constitutional right to information not otherwise available to others." This is true; however, the psychiatrist-patient privilege in this case impacts directly on the substantive area of liability for defamation. "[T]o refuse evidence is to refuse to hear the cause." Edmund Burke, quoted in I *Wigmore, Evidence* §10, at 672 (Tillers rev. 1983). "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

In this case, the evidence that is sought by the defendants goes directly to the burden of proof. This evidence has direct bearing on the truth or falsity of the defendants' statements. This is not merely a discovery matter; the evidence sought here goes to the very substance of plaintiff's case and of the defendants' defense.

Code 1975, §34-26-2, states that confidential relations and communications between a psychiatrist and client "are placed upon the same basis as those provided by law between attorney and client." In speaking of the attorney-client privilege, this Court has held that there are limitations on the application of the rule of privileged communications. *Ex parte Griffith*, 278 Ala. 344, 350, 178 So.2d 169, 176 (1965), *cert denied*, 382 U.S. 988 (1966). So too, there are limitations on the psychiatrist-patient privilege. It is not an absolute privilege; it is a limited, evidentiary privilege that was created to protect and encourage confidential communications between a psychiatrist and patient by preventing the psychiatrist from making that information public. This exclusion of evidence is an expression of public policy. *See generally* 81 Am. Jur. 2d, *Witnesses*, §231 (1976). However,

that expression of public policy must yield when it comes into conflict with a higher expression of public policy; namely the United States Constitution.

Commentators have noted that a limited, evidentiary privilege should give way to any higher, necessary demands of justice. *See McCormick on Evidence*, §§77, 87 (3d ed. 1984); Comment, *The Attorney-Client Privilege in Alabama*, 28 Ala. L. Rev. 641, 675 (1977). "Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances." *Herbert v. Lando*, 441 U.S. 153, 175 (1979).

The majority recognizes that "There may be instances where the media defendant would be allowed to discover privileged communications, but that case is not now before us." Since the majority is denying the defendants access to the determinative evidence on a determinative substantive issue, I cannot imagine what "instances" would allow the media defendant to discover a third party's privileged communications in a defamation case. If this is not the case, then there will probably never be one. For all practical purposes, the majority has made the psychiatrist-patient privilege absolute under these circumstances. This Court has stated that the rule of privilege is defensive, not offensive. *Ex parte Griffith*, *supra*, 278 Ala. at 351, 178 So.2d at 176. Petitioner is attempting to use his client's shield as a sword against the defendants. When it strikes against the defendants' First Amendment shield, that sword must shatter.

The United States Supreme Court has held that evidentiary privileges must give way when they come into conflict with constitutional rights. In *Davis v. Alaska*, 415 U.S. 308 (1974), the Supreme Court held that the confidentiality of a juvenile's record of delinquency is an important interest but that the Sixth Amendment's right of confrontation is paramount to

the policy of protecting a juvenile offender. "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require [the] yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Davis*, 415 U.S. at 320. The dissent in *Davis* stated, "[T]here is no constitutional principle at stake here. This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination." 415 U.S. at 321 (White, J., dissenting). Similarly, in the present case, the majority has treated this as nothing more than a discovery issue and has ignored the substantive impact this discovery issue will have on the defendants' First Amendment rights.

In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the United States Supreme Court, relying on *Davis v. Alaska*, held that the confidentiality of a juvenile offender's records must yield to a media defendant's First Amendment rights. Both *Davis* and *Smith* dealt with a third party's privilege, and that privilege had to yield when it came into conflict with a constitutional right.

A witness's confidential psychiatric records were ordered disclosed when that person's privacy interest came into conflict with a defendant's right to cross-examine, in *United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983).

> "Broad-brushed assertions of the societal interest in protecting the confidentiality of such information cannot justify the denial of these defendants' right to examine and use this psychiatric information to attack the credibility of a key government witness. A desire to spare a witness embarrassment which disclosure of medical records might entail is

> insufficient justification for withholding such records from criminal defendants on trial for their liberty."

698 F.2d at 1167.

The Eleventh Circuit Court of Appeals in *Lindstrom* relied upon *Davis v. Alaska*.

First Amendment rights prevail over evidentiary privileges as much as Sixth Amendment rights do. "The important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment." *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 104.

The majority relies on *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P. 2d 673 (1982), affirmed, 467 U.S. 20 (1984), for the proposition that the media receive no greater constitutional protections than the general public. The majority ignores the fact that the Washington Supreme Court allowed the media defendants there to discover the privileged information of third parties in a defamation suit:

> "Turning to the plaintiffs' cross appeal, the major contention is that requiring disclosure of membership lists, donors and benefactors violates the rights of privacy and the associational rights of these persons. As should be clear from our previous discussion, certain invasions of those rights are necessary to enable the courts to render a just decision upon the relevant facts.
>
> " . . . .

> "The plaintiffs, as the defendants point out, are attempting to assert a privilege to withhold evidence in a private suit where they seek damages based upon the allegedly privileged information. We have reviewed the cases cited in their brief and find none which supports the theory in the circumstances of this case."

98 Wash. 2d at 257-58, 654 P. 2d at 690-91.

Even without discussing the defendants' First Amendment rights, the Washington Supreme Court held that the privileged information was discoverable.

Chronicle Publishing Co. v. Superior Court, 54 Cal. 2d 548, 7 Cal. Rptr. 109, 354 P. 2d 637 (1960), is also no help to the majority. *Chronicle Publishing Co.* was decided in 1960, well before the current First Amendment analysis was developed by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and the cases that followed and built upon *New York Times*. No First Amendment right was ever raised by the defendant in *Chronicle Publishing Co.*

This case appears to present a question of first impression, not only for this Court, but for every jurisdiction in the country. I do not believe that this case can be disposed of as simply a discovery matter, expecially in light of the fact that speech on public issues is the highest of First Amendment values and is entitled to special protection. *Connick v. Myers*, supra. Perhaps the United States Supreme Court will have to resolve this unique issue. It is my opinion that the psychiatrist-patient privilege of §34-26-2 does impinge upon the defendants' First Amendment rights in this case, and, therefore, I would deny Dr. Rudder's petition for writ of mandamus.

Houston and Steagall, JJ., concur.

Supreme Court, U.S.
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CLERK

(3)

No: 86-1099

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CHRISTOPHER N. GALANOS, §

Petitioner, §

vs. §

ALEX T. HOWARD, JR., JUDGE, §

§

Respondent. §

RESPONDENT HONORABLE ALEX T. HOWARD, JR.'S REPLY BRIEF TO PETITIONER CHRISTOPHER N. GALANOS' PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF JURISDICTION

This Court should not accept jurisdiction. The Order of the Court of Appeals entered October 3, 1986, affirming without opinion the order of the United States District Court for the Southern District of Alabama, Southern Division simply affirmed a discretionary discovery ruling by the Honorable Alex T. Howard, Jr., Respondent, under Rule 26(b)(1), F.R.C.P. which states,

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the parties seeking discovery or to the claim or defense of any othe party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissable at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT OF THE CASE

A. Introduction to the Claims of Plaintiff William H. McGill.

This is a suit brought by William H. McGill (herein referred to as "McGill") against the City of Mobile, Mobile Police Chief Winston J. Orr, Lester Hargrove, Charles S. Summers, Bernard Henebry, Robert P. Larison, and Mobile County District Attorney Chris N. Galanos (herein referred to as Galanos). The suit is under 42 U.S.C. §§ 1983 and 1985. McGill was employed by the City Police Department as a policeman. The Defendants Orr, Hargrove, Summers, Henebry and Larison were employees of the Mobile Police Department and were involved in the dismissal of McGill from the Mobile Police Department on September 13, 1983. Galanos is the District Attorney of Mobile County.

The suit alleges that on September 7, 1983, while McGill was acting as a policeman on routine patrol for the Mobile Police Department, McGill attempted to arrest Galanos on a charge of driving an automobile under the influence of drugs which impaired his physical or mental facilities to a degree which rendered him incapable of safely driving (DUI). This is sometimes referred to as the "Incident". The suit alleges that the motivating reason McGill was fired from the Mobile Police Department was his arrest and attempt to charge Galanos with DUI. Although not a necessary allegation to the suit, Galanos' motivation for wanting McGill terminated was that he saw McGill's attempt to lodge a charge and prosecute him as a great conspiracy which he perceived at the time.

The First Cause of Action alleges that McGill's right to charge Galanos for a crime committed in his presence, including the right to sign a warrant and testify, was violated by the City of Mobile's firing of McGill. This right was protected by the First and Fourteenth Amendments to the Constitution of the United States under the right of free

speech. Under the First Amendment, McGill could not be punished or retaliated against by the Defendants for his exercise or threatened exercise of free speech. The Complaint also alleges that not only was McGill's exercise of free speech protected by the First Amendment, but McGill was also protected by various state statutes which prohibited the Defendants from obstructing justice or otherwise interfering with a police officer such as McGill in the carrying out of his duties. These statutes which are cited in the Complaint included criminal statutes prohibiting persons from criminal coercion and intimidating a witness.

McGill's attempt to exercise his right of free speech was a substantial or motivating cause of his dismissal from his public employment as a police officer. McGill claims damages under 42 U.S.C. § 1983 and also under 42 U.S.C. § 1985(2), which provides a cause of action against two or more persons who "conspire for the purpose of impeding, hindering, or obstructing, or defeating, in any manner, the due course of justice in any state . . ., with intent to deny any citizen equal protection of the laws . . ." The Complaint alleges that McGill, as a member of a class of persons within the Mobile Police Department protected by the criminal statutes cited above, was denied equal protection of the laws which permitted and even required McGill to prosecute anyone for the commission of a criminal offense in his presence. McGill alleges that the conspiracy to retaliate against McGill by the Defendants for performing his legal duties will have a chilling effect upon other members of his class within the Mobile Police Department in the exercise of their right of free speech, i.e., members of the Department who attempt to prosecute high public officials for criminal acts.

The Second Cause of Action alleges that McGill was denied a property right in his public employment without due process of law. The Third Cause of Action alleges that McGill was deprived of his liberty interest without due

process of law in that McGill was terminated for attempting to prosecute the Defendant Galanos. The Fourth Cause of Action alleges the Tort of Outrage in that the Defendants willfully, and by their extreme and outrageous conduct attempted to terminate McGill for his exercise of his constitutional right of free speech. The Fifth Cause of Action alleges an intentional tortuous interference with McGill's employment.

B. Statement of the Facts.

On the night of September 7, 1983, McGill attempted to arrest Galanos in front of Galanos' ex-wife's apartment after observing Galanos speeding while driving to the apartment, acting erratic, acting unsteady on his feet, and bracing himself on the side of the automobile while he attempted to walk alongside of his automobile. See, McGill deposition pages 40-45. McGill tried to charge Galanos with driving under the influence of alcohol or drugs or narcotics and/or falsifying information to a police officer and trying to file a false report. See, McGill deposition page 46. At the scene, McGill was prevented by some of his superiors who arrived on the scene from placing Galanos under arrest and taking him down to the docket. McGill told one of them, a Corporal Allen, that,

Galanos had falsified a police report to me, it caused me to run through town at high rates of speed to get to a hoax call, and after observing his condition that he appeared to be under the influence of narcotics and not alcohol at this time, because I got real close to him and didn't smell any alcohol, and my intentions was arresting him and placing him in jail.

See, McGill deposition pages 49-50.

At 8:00 a.m. the next morning Galanos went over to see Police Chief Winston Orr to complain about McGill and request an Internal Affairs investigation of the events of the preceding night. See, Galanos deposition page 33. Orr and Galanos discussed Galanos' filing a complaint with the Office of Internal Affairs of the Mobile Police Department which at that time was the internal investigative arm which investigated disciplinary problems and complaints against policeman. See, Orr deposition page 16. Prior to the time Galanos arrived in his office at 8:00 a.m. Orr had been informed by his assistants about the Incident the night before with Galanos and had been told that "McGill threatened to go get a warrant for him [Galanos]". See, Orr deposition page 26. They had further told him that "Billy was insistent on making an arrest." See, Orr deposition page 33.

Galanos filed a complaint with Internal Affairs and it was assigned that day to an officer by the name of Mike Rowland. Rowland went to Orr's office and explained to Orr what Galanos wanted to do and Orr told him to "get into it". See, Rowland deposition page 11.

At the time Galanos filed his complaint with Internal Affairs there werre two unrelated allegations of misconduct pending against McGill involving an incident at a K-Mart and an incident involving a conflict with a citizen by the name of Doug Hammac. These investigations had not been concluded at the time Galanos filed his complaint. See, Rowland deposition pages 12-13.

Rowland's investigation began on September 8th and was not concluded until September 12, 1983. See, Appendix A. Rowland's September 12, 1983 Letter Report to Orr. Rowland did not finish interviewing witnesses until he was writing his report on September 12, 1983. See, Rowland deposition page 18.

Despite the fact that Rowland's investigation was just

starting on September 9, 1983, McGill was hand delivered a Pre-disciplinary Action Notice on September 9, 1983 at 5:00 p.m. informing McGill that on September 10, 1983 at 5:05 p.m. (twenty-four hours later) disciplinary action was to be taken against him. See, Appendix B attached hereto. In the September 9, 1983 Pre-disciplinary Action Notice McGill's entire record with the Police Department was set out. Specifically, the Hammac and K-Mart incidents which were then being rushed to completion were referred to in the Notice. The Notice also included the Galanos Incident stating,

> On, or about September 8, 1983 Mr. Christopher Galanos, lodged a complaint for unprofessional and abusive conduct and conduct unbecoming an officer of this department.
>
> All of the complaints that have been lodged against you and specifically those complaints filed within the last two weeks as set out above, have been fully investigated by the Internal Affairs Division of this Department and as a result of those investigations, I must concur that a Pre-disciplinary Hearing should be held in the office of the Chief of Police, City of Mobile, on September 10, 1983 at 5:05 p.m. (Emphasis added.)

Rowland testified that the Notice's statement that "All of the complaints have been fully investigated by the Internal Affairs Division" was a false statement because the investigation of two of the three incidents was not completed. Rowland's report on the Galanos Incident would not be forthcoming for another three days. See, Rowland deposition page 18. Rowland testified that as of September 9th he did "not have all the information available to us at that time". See, Rowland deposition page 19. The Internal Affairs report on the K-Mart incident wasn't even written until September 13, 1983, four days later. See, Appendix D. As will be seen,

the September 10th hearing resulted in McGill being recommended for termination because of all three incidents.

By report dated September 12, 1983, Internal Affairs, through Rowland, ruled in McGill's favor. Rowland found as a fact that McGill did not improperly detain Galanos on the night of September 7, 1983. See, Rowland deposition page 31, also see Appendix A. Rowland testified "According to the procedures of the Police Department, he [McGill] acted within those procedures and guidelines within the state law". See, Rowland deposition pages 31-32. Rowland's only adverse ruling on McGill was that McGill had improperly communicated with the news media in latter defending himself from Galanos' public statements that he had been "held hostage" by McGill[1]

On the same day as Rowland's report to Orr, September 12th, Orr wrote a report to Robert B. Doyle, Jr., then the City Commissioner in charge of police matters, that all the complaints against McGill had been fully investigated, including the Galanos Incident which was specifically named, and advised him that disciplinary action had been taken against McGill on September 10th. See, Appendix C, September 12, 1983 letter from Orr to Doyle. The letter further informs Doyle that the Pre-disciplinary Hearing had been held, and that Orr recommended McGill be terminated.

By letter dated September 13, 1983, the City gave McGill his letter of termination referring to the September 10, 1983 hearing and stated that McGill's "services with the Mobile Police Department be terminated effective September 13, 1983". See, Appendix D. The Galanos Incident was conspicuously omitted from the City's letter of termination

[1]This finding is not an issue in this case as it has been settled separately by the parties.

although Orr's recommendation to Doyle to terminate McGill had included it.

Orr had admitted in his deposition at pages 62-63, that the Galanos Incident was one of the reasons that he recommended that McGill be terminated, even though it was omitted from the City's letter of termination. When asked why the Galanos Incident was in Orr's September 12, 1983 letter recommending termination, when the City was now contending that the Galanos Incident was not a reason for McGill being dismissed Orr explained at deposition page 64,

> Q. Well, just to get to the bottom line, are you telling me that it was somebody's mistake that the Galanos incident appeared in Exhibit 2?
>
> A. As an afterthought, yes, it would be, but at the time it might not have been a mistake, it might have been intentional, either by me or the legal advisor. And I didn't object to it, so it was by me.
>
> Q. A mistake by you?
>
> A. It was a mistake by me to sign that if I didn't believe in it. And I sure signed it, and it's dated.

Orr believed, and had discussed with the Defendants Larison and Henebry (other superiors of McGill within the Police Department) that it was a "bad idea" to include the Galanos Incident in McGill's termination. See, Orr deposition pages 65-66.

Orr and then former City Commissioner Gary Greenough had discussed bringing the Galanos Incident into the dismissal. Orr testified at page 73 that Greenough said, "Then you're going to turn it into a big fiasco if you try to bring the Galanos thing into the Personnel Board as the reason he got dismissed".

Between September 7th and McGill's dismissal on September 13th, McGill attempted to charge Galanos and get a warrant from the Mobile Police Department Warrant Clerk to arrest Galanos. McGill testified that he attempted to get the warrant by contacting the Warrant Clerk Effie Diamond and was refused. See, McGill deposition pages 62-63. He advised her by telephone that,

> I advised her who I was. Asked her if she would type me up a warrant, I was on my way to the police station and would take it in before the Judge. She said, I will. Wanted to know the place of occurrence and everything, wanted to know the person's named on the warrant, which I read off Christopher Nicholas Galanos' name. Place of employment, I told her the District Attorney for Mobile County. She says, I am going to have to refuse this warrant. I asked her why. She said, because of a person of his caliber and position, that you need to talk to Chief Orr before you swear out such a warrant.

See, McGill deposition page 63.

McGill further testified that he talked to Chief Orr in his effort to get the warrant. See, McGill deposition page 64. When McGill was called into Chief Orr's office the next morning, September 8, 1983, McGill was forcefully instructed to keep quiet and do nothing. He described the scene with Orr,

> Well, as soon as I walked in the office, before I was even asked to sit down or whatever, he asked me, he says, did you talk to the Attorney General about Chris Galanos. I said, no sir, I have not. He says, have you drawn a warrant anywhere on Chris Galanos. I said no, sir, I have not. And then in a belligerant, obnoxious manner he says and

pointing his finger, don't. (Emphasis added.)

See, McGill deposition pages 69-70.

Rowland's investigation verified that McGill had tried to get a warrant for Galanos but could not. See, Rowland deposition pages 71, 26. Sergeant Jim West, Rowland's superior, testified there was no justification for refusing McGill's request to get a warrant. He testified at pages 30-31.

> Q. Well, let's assume that Billy McGill saw Chris Galanos and in Billy's opinion, he was guilty of D.U.I. and Billy tried to go down to the clerk's office — the warrant clerk's office to get a warrant for his arrest, is there any justification in your opinion for not allowing him to get that warrant?
>
> MR. ROSSLER:
>
> Object to the form of the question.
>
> A. No.

Rowland testified that the reason he did not ask Galanos about whether or not Galanos used drugs and whether or not he was under the influence of drugs on the night of September 7, 1983 was because "I knew he took those drugs". See, Rowland deposition page 77.

Rowland testified that while he was investigating the Galanos Incident for Internal Affairs, "pressure" was put upon him by Orr and Galanos to sustain the complaint against McGill. See, Rowland deposition page 36. Rowland testified that the pressure was "basically because of the political ramifications of what had happened and the political air that was going on within the Police Department at the time" (Emphasis added). See, Rowland deposition page 37. Rowland continued at page 37.

A. There was at least one other investigation going on within the Police — not within the Police Department, but within the City, specifically the auditorium investigation, which involved a City Commissioner, which brought some — some — I want to say bad politics into the Police Department through the — some allegations that some police officers had assisted the Commissioner in specifically breaking into the District Attorney's house, possibly bugging his telephone, and that sort of thing.

Galanos was paranoid about McGill trying to arrest and prosecute him, feeling that McGill was part of a conspiracy to discredit Galanos. Rowland testified at page 38,

Galanos felt that this particular incident was part of the conspiracy to discredit him, and he was concerned about that. I think — you know, my knowledge of what was going on would indicate that some of the pressure — that there was pressure coming from within the department to sustain this complaint.

Q. Okay. Who specifically within the Police Department was applying the pressure to sustain the complaint?

A. Basically the Chief wanted it sustained. (Emphasis added.)

At page 80, Rowland testified,

Q. Do you think he [Galanos] felt that Billy McGill was part of this great conspiracy to get him and, therefore, Billy ought to be terminated off the Police Department.

A. He thought that. (Emphasis added.)

There is direct evidence from Rowland that Galanos was the one who caused the City to terminate McGill. At page 58, Rowland testified,

> Q. Did Galanos ever make a direct statement to you or in your presence that he wanted Billy Mcgill terminated or disciplined?
>
> A. Yes, sir, he did.

Rowland testified that Galanos was "fairly emphatic" about it. See, Rowland deposition page 58. He further acknowledged that Chief Orr was the only one at the Police Department who had enough influence to cause McGill to be dismissed. See, Rowland deposition page 50. That is exactly the person that Galanos went to see the morning after the Incident. Galanos didn't merely file an Internal Affairs complaint. He went to Orr the day after he was arrested with the intent to get McGill terminated and the resulting decision to terminate McGill was made on September 8, 1983. Rowland described his conversation with Chief Orr about what Galanos told Chief Orr he (Galanos) wanted. At page 67 Rowland testified,

> Q. All right, sir. And what was it that the Chief told you regarding that?
>
> A. Basically the Chief told me that Chris wanted McGill fired. (Emphasis added.)

The follow-up Internal Affairs investigation and the September 13, 1983 dismissal letter was simply window dressing to polish up a decision that had already been made. Once McGill was terminated, he was effectively neutralized from saying anything or pursuing the matter in Court.

Not only is it obvious from the above that the Galanos Incident was the main reason that McGill was terminated, and that the motive for the termination was that Galanos was paranoid about McGill being part of some great conspiracy perceived by Galanos, but that the whole termination was a subterfuge made to look like the Galanos Incident had nothing to do with the termination. The truth is that the Galanos Incident was the main motivating cause.

The evidence further shows that Orr and his underlings participated in a conspiracy with Galanos by trying to influence Mike Rowland of Internal Affairs to make findings which Rowland did not believe were correct. Rowland testified at page 39, that Orr wanted the Galanos' complaint sustained explaining,

> A. He [Orr] — he had told me at one point — I don't know whether he told anyone else, but I know he had told me at one point that he felt like Billy was tied someway with Greenough, that they were friends, he knew they were friends, at one point. And that since Greenough was in so much trouble at the time, that he had probably planted it into Billy's head that if he ever got the opportunity, you know, to stop Galanos or to do something to him or whatever else, and felt like there was some justification in that.
>
> Q. And would that be — did he make the comment to you when you started your investigation?
>
> A. Yes. (Emphasis added.)

It was further Rowland's opinion that McGill should not have been dismissed from the Police Department. Rowland testified that McGill was dismissed because that was what Galanos wanted to happen and Galanos had enough influence with the Police Department to have McGill

dismissed even though Rowland did not think he should be. See, Rowland deposition pages 49-50.

Apparently because McGill's termination as of September 13, 1983, was so obviously motivated by the Galanos Incident, the City attempted to clean up their act by giving McGill a second disciplinary hearing and refiring McGill by letter dated October 18, 1983. See, Appendix E attached hereto. This termination refers to the K-Mart and Hammac incidents and substitutes a new charge dated April 15, 1983 which had not previously been mentioned. The Galanos Incident was nowhere mentioned in the second termination. However, the truth surfaced in a letter Greenough wrote. Commissioner Greenough did not sign the second termination letter because he felt it was clear McGill was being terminated because of the Galanos Incident. Greenough wrote to Commissioners Doyle and Mims on October 18, 1983 (see Appendix F attached hereto) "After having carefully reviewed the reports and information concerning Officer William H. McGill, it is apparent that the incident which led to his termination was the [Galanos] incident which occurred on September 7, 1983." (Emphasis added.) Greenough further stated that he could not sign the October 18th termination letter because of this reason.

Rowland testified that the second, October 18th, termination was because of "some mistakes in the first termination, and they [the City] were attempting to clear those up with the second termination." See, Rowland deposition page 51.

Ultimately, a Mobile County Special Grand Jury completely vindicated McGill's position. By Grand Jury Report of October 26, 1983, (see Appendix G attached hereto) the Grand Jury (1) indicted Galanos on the DUI charge — the same charge McGill tried to arrest him for, (2) found no evidence to support Galanos' charge that there was "any conspiracy to discredit Mr. Galanos in order to hinder any

investigation that he may have had in progress", and (3) reported "Finally the Grand Jury found no evidence to support the charge that Officer Billy McGill violated Alabama Code, Title 36-10-5 which prohibits the unlawful detention of another under color of officer (sic)."

Galanos' criminal DUI case was settled December 2, 1983 with the State dismissing the DUI case and Galanos agreeing to "take a leave of absence for medical reasons" (Emphasis added). See, Galanos deposition page 59.

Compounding the fact that Galanos used his personal influence as a District Attorney to get McGill fired, Galanos improperly obtained McGill's Internal Affairs file from Mike Rowland during the termination proceedings. Orr testified that Galanos knew that the Internal Affairs files were not available to the District Attorney because the purpose of the Internal Affairs investigations was to encourage officers to voluntarily make statements to Internal Affairs. With regard to the acquisition of McGill's disciplinary file by Galanos, Orr testified, "So what I am saying is, it's not ethical. Galanos knows it not ethical." (Emphasis added.) See, Orr deposition pages 88-89. Orr testified that the file was "confidential between him [Orr] and that the investigator and the Chief of Police." See, Orr deposition page 90. Orr testified that he had a firm understanding with Galanos as Chief of Police that Galanos did not have access to the Internal Affairs files contrary to the written policy of the Mobile Police Department. See, Orr deposition page 90.

Rowland's recollection of the file acquisition was that Galanos asked him for Billy McGill's Internal Affairs file and Rowland told Galanos that he could not give him the file because "I felt like I could be held in some either civil or maybe criminal position for being — you know, for releasing that information without the authority of the Chief". (Emphasis added.) See, Rowland deposition page 54. After that Rowland was in Orr's office and Orr told him to give

Galanos a copy of the file. See, Rowland deposition pages 55-56.

ARGUMENT

Galanos first argues that he did not inject his mental state as an issue in this case and, therefore, McGill should not be allowed to take the deposition of Dr. Rudder, Galanos' psychiatrist who treated him for drug dependency. The District Court has already rejected the relevancy argument and certainly the trial judge has discretion in such matters. The test under Rule 26 F.R.C.P. is not relevancy but whether or not the evidence sought could lead to the discovery of admissible evidence. McGill notes that it was Galanos himself who was driving under the influence of drugs on the night of September 7, 1983. The fact that sufficient evidence of this exists is proven by the fact that a Mobile County Grand Jury indicted Galanos on the same charge that McGill was trying to arrest him for. Galanos' DUI case ended with a deal struck between the State of Alabama and Galanos, whereby Galanos agreed to get "medical" attention for his drug habit in exchange for the dismissal of the charge made by the Grand Jury. Rowland was so sure that Galanos was using drugs on the night in question that he did not even ask Galanos in his interview as to whether or not he was using drugs because "I knew he took those drugs." See, Rowland deposition page 77. It is certainly relevant to Rowland and helpful to McGill's case that he was rightly attempting to tell the proper authorities, arrest and prosecute Galanos on the DUI charge. It is also relevant and helpful to McGill's case that Galanos was in fact guilty of using drugs on the night in question. His attempt to hide this drug usage by causing McGill to be terminated from the police force shows the wrongfulness of his conduct as well as the maliciousness of his intent. Galanos' malicious intent would be extremely pertinent to the punitive damage aspect of the case. Punitive damages can be recovered from individual

defendants under § 1983.

Even though Rule 26 makes the test not relevancy but, whether or not the information sought would lead to the discovery of admissible evidence, and even though the discovery rulings are generally discretionary with the District Court, the District Court in a well reasoned opinion (see, Petitioner's Appendix D, Page 32-A) ruled in favor of McGill on the question of relevancy under Rule 501. Fed.R.Evid. Rule 501 provides,

> [t]he privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common laws as they may be interpreted by the courts of the United States in the light of reason and experience.

Thus, principles of common law as they are interpreted by the courts of the United States are controlling. Therefore, as the District Court noted "Privilege, therefore, is governed by the first sentence of Rule 501, Fed.R.Evid., which makes privilege a matter of federal common law." The District Court correctly found that the second sentence of Rule 501 cited by the Petitioner Galanos is not applicable and therefore Alabama's privilege rules do not control. Galanos' Petition does not seek to explain why the second sentence of Rule 501 applies, but simply argues vague principles of constitutional rights of privacy and claims of congressional recognition of the necessity of confidentiality for chemically dependent people.

As noted by the District Court, federal courts have generally been restrictive as to "recognizing testimonial privileges. See, Trammel v. United States, 445 U.S. 40 (1980), and American Civil Liberties Union of Miss. v. Finch, 638 F.2d 1336 (5th Cir. 1981). Federal common law does not even recognize the general physician/patient privilege. See, United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983).

As the District Court correctly reasoned the claimed privilege is akin to that which would have been recognized in the proposed evidence Rule 504 which was not enacted by Congress and the majority of federal decisions reject the "psychotherapists privilege" which would have been created by proposed Rule 504. See, In Re: Doe, 711 F.2d 1187 (2nd Cir. 1983).

This Court has not recognized a constitutional right to privacy and the fact that there is a quasi federal regulatory privilege for persons seeking treatment for drug and alcohol abuse as cited at page 6 of Respondent's Petition certainly does not give rise to the creation of a new constitutional right.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied because (1) Dr. Rudder's testimony is relevant to the case, and (2) Galanos has not presented any federally recognized privilege which would protect the psychiatrists' testimony and records.

Dated this 29th day of April, 1987.

Respectfully submitted,

VINCENT F. KILBORN
KILBORN & GIBNEY
Post Office Box 1904
Mobile, Alabama 36633

Attorney for Respondent

CERTIFICATE OF SERVICE

I, Vincent F. Kilborn, attorney for the Respondent in the above entitled case, hereby certify that I have on this the 29th day of April, 1987, served a copy of the foregoing brief upon counsel for all parties to this proceeding by depositing a copy thereof in the United States mail, properly addressed and first class postage prepaid to:

Davis Carr, Esq.
Attorney at Law
Post Office Box 123
Mobile, Alabama 36601

Roderick P. Stout, Esq.
Attorney at Law
Post Office Drawer 2164
Mobile, Alabama 36652

VINCENT F. KILBORN

APPENDIX

APPENDIX "A"

CITY OF MOBILE

MOBILE, ALABAMA

COMMISSIONER

September 12, 1983

PLEASE ADDRESS REPLY TO

Winston J. Orr
Chief of Police
Mobile Police Department
Mobile, Alabama 36602

Dear Sir:

On September 8, 1983, the Office of Internal Affairs was contacted, through your office, by the District Attorney of Mobile County, the Honorable Chris N. Galanos, in reference to allegations of misconduce involving Officer William McGill. The charges alledged by Mr. Galanos stemmed from an incident which occurred on the evening of September 7, 1983, when Mr. Galanos had occasion to be given a police escort by Officer McGill and was subsequently detained by the officer for Driving Under the Influence of Alcohol (DUI). After arriving at their destination, Mr. Galanos contends that he was illegally detained for a period of almost two (2) hours while confined to the back seat of a police vehicle and was not allowed to attend to his family emergency. Galanos also states that after being released from the police car, he was refused a Photo-electric Intoximeter (PEI) test and was further humiliated by being forced to allow Sergeant Obie Singletary to drive him home.

A thorough investigation has been conducted into this matter and the results are now complete. A summary of the incident in question is as follows.

On September 7, 1983, at approximately 10:30 P.M., Mr. Galanos talked by phone to his ex-wife, Gwen, from the residence of his parents, Mr. and Mrs. Nick Galanos, located at 5717 Knight Court, in the Regency subdivision. Mrs. Gwen Galanos lives at 2004-C Portier Court in the D'Iberville Apartments, in the area of Springhill Avenue and Stanton Road. During the conversation, Mrs. Galanos related to her ex-husband that their child, a three year old white female, had gotten lost while shopping at Bel Air Mall and that she had found the little girl, but that both she and her daughter were extremely upset. Mr. Galanos told his ex-wife that if she needed him, he could be reached by calling his pager number. A few minutes later, Gwen called Mr. Galanos on his pager and excitedly requested that he "come quick". As a result, Mr. Galanos got in his car, a silver Toyota station wagon, and proceeded to his ex-wife's apartment.

Upon turning east on Airport Boulevard from the Regency subdivision, Galanos noticed a police car in the parking lot of a doctor's office, which is located on the north side of the intersection. In an attempt to draw attention to himself and, hopefully obtain a police escort, Galanos put his blue emergency light on the

EXHIBIT "A"

BEST AVAIL

roof of his car and turned it on, then continued eastbound on Airport Boulevard.

When Mr. Galanos approached the intersection of Airport and Downsview Boulevard, he was spotted by Officer William McGill, who was in car 134. Officer McGill, who was in the parking lot of the Max Club, gave pursuit to determine who was operating a plain vehicle with a blue emergency light. At the intersection of Airport and Windsor Place, in front of the Airport Twin Cinema, Officer McGill turned on his blue lights and stopped Mr. Galanos. Upon recognizing him, McGill asked, "Is anything wrong?" Galanos replied that he had an emergency at his wife's house and gave directions to Officer McGill. The officer then instructed Galanos to follow him and proceeded to contact police communications by radio and advise the operator that he was conducting an escort.

Mr. Galanos had instructed Officer McGill to take the route of Dauphin Street to Upham Street, then Upham to Springhill Avenue, then east on Springhill to DeSales Avenue. As Officer McGill reached Upham Street, he missed the turn and was forced to continue on to Fulton Street and make the block back to Upham. Galanos, however, made the turn at Upham and continued on until McGill caught up with him just south of Springhill Avenue. Radio traffic, at about this time, shows that McGill called for Corporal Albert Allen, car 135, to come to Dauphin and Upham Street, but he did not specify why he called for the meeting. As Corporal Allen turned south on Upham from Springhill, he observed Galanos drive past him with Officer McGill following. The two vehicles turned east on Springhill and proceeded to turn north on DeSales Avenue. Corporal Allen turned around and gave chase.

When Mr. Galanos and Officer McGill arrived at their destination on Portier Court, Mr. Galanos exited his car and turned to thank Officer McGill for his assistance. At this point, McGill states he saw Mr. Galanos "stagger and fall" and suspected that it was possible that Mr. Galanos was intoxicated. He, therefore, asked Mr. Galanos to get in the back of his police car. Within seconds, Corporal Allen arrived on the scene.

Galanos agreed to submit to anything Officer McGill requested of him, but asked the officer to first allow him to check on the status of his ex-wife and child. McGill refused and Mr. Galanos got into Officer McGill's car. Upon conferring with Officer McGill, Corporal Allen suggested that a supervisor be called to the scene and then went to a pay phone, located at Springhill and Stanton Road, and called the precinct. Corporal Allen instructed Lieutenant Holifield as to the circumstances and requested his assistance.

After returning to the scene, the officers approached the residence of Mrs. Galanos and inquired as to whether she had an emergency. She stated that she did not. On questioning by the officer, Mrs. Galanos says that she responded in that way because she felt that her family problems were not a police matter, but upon reflection, had she known that Mr. Galanos was in the police car, she would have told the officers of her real emergency.

Mrs. Galanos [illegible] Officer McGill [illegible]

ABLE COPY

blood, why were the tests not given? Surely, this would have either strengthened Officer McGill's case or it would have cleared Mr. Galanos undeniably.

Thirdly, (and this question has been asked by both the officer and Mr. Galanos), if Lieutenant Holifield did not believe that Galanos was intoxicated, why was he not allowed to attend to his personal business on Portier Court and then drive himself home?

In his statement to Internal Affairs, Officer McGill contends that he followed police policy and procedure in respect to his actions in this case. He asserts that he maintained control of the situation until supervisors arrived and that upon their arrival, the arrest or release of Mr. Galanos became the responsibility of those individuals. In this case, Officer McGill's contention seems to be true. However, there is no profound basis, in this case, to believe that Mr. Galanos was either intoxicated or on medication. This can be confirmed by the statements of the other officers on the scene. Therefore, due to the complexity of this case and the obviously open-cooperation of Mr. Galanos, it appears that the allegation made by Officer McGill as to the sobriety of Mr. Galanos is simply a bad judgment call on the part of the officer.

Due to Officer McGill's misinterpretation of the sobriety of Mr. Galanos, it would be logical to conclude that Mr. Galanos was improperly detained and prevented from attending to his personal emergency as he alleges in his complaint.

It is obvious that a case involving a citizen of such local prominence as the district attorney would be of interest to the news media and the people of this city. To further complicate this matter, Officer McGill has given numerous interviews and statements regarding this case to all three factions of the media (television, radio, and newspapers). This is clearly and blatantly a violation of the Mobile Police Department Rules of Conduct, Section 1.30 concerning public statements and appearances. The nature of Officer McGill's statements and certain accusations which he has lodged against both Mr. Galanos and the police department in regard to this case has, without doubt, cast a shadow of disrepute on the principals in this case, including the department itself and thereby has served only to erode public confidence in the integrity of this department and its members.

Considering all facts pertinent to this case, numerous violations of departmental rules and regulations can be noted. Specifically, these are:

(1) 1.01- Violation of rules
Officers shall not commit any acts which constitute a violation of any rule, regulation or directive of the department.

(2) 1.02 - Unbecoming Conduct
Officers shall conduct themselves in such a manner as to reflect most favorably on the department.

(3) 1.43 - Public statements and appearances

BEST AVAI

(A) Officers shall not publicly criticize or ridicule the department.

(B) Officers shall not address public gatherings, appear on radio or television, prepare articles for publication, or release investigative information...

(4) 1.37 - Dissemination of information

Officers shall treat the official business of the department as confidential.

As a result of this investigation and consideration of all the facts previously listed, the Office of Internal Affairs will carry this complaint against Officer McGill as sustained.

As usual, our files in this matter are available for your inspection and/or review.

Respectfully,

Mike Rowland, Corporal
Internal Affairs Division

MR/pes

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APPENDIX "B"
PRE-DISCIPLINARY ACTION NOTICE

TO: William H. McGill
(Name of Employee)

FROM: Winston J. Orr, Chief of Police
(Appointing Authority)

SUBJECT: Dismissal
(Contemplated Disciplinary Action)

You are hereby advised that disciplinary action is contemplated against you for the following reason(s):

Your supervisors inform me that your record of performance with the Police Department in the past several years warrant you being terminated. From July 6, 1971, your employment date, to the present time, which is September 9, 1983, during this time, you have shown a marked deficiency in the characteristics and traits needed to function as a Police Officer. The following is a chronological order of events which bear out their observations and conclusions:

Accidents involving police cars:

5-07-72 - Worked three off days and reprimand
1-15-80 - Written reprimand
1-21-80 - Written reprimand

Incidents involving your conduct:

7-17-83 - Drinking off duty at High Chapperal (shot WM)
(cont'd)

You are further advised that on September 10, 1983 at 5:05 P.M.
(Date) (Time)
in the office of the undersigned, you will be allowed to respond orally or in writing to the above charges if you so desire. You are not required to make any statement at this interview if you do not desire to respond. You are not entitled to an adversary hearing at this time before the undersigned. Should you be disciplined, you have a right of appeal as granted by the Rules of the Personnel Board.

Winston J. Orr
Signature of Responsible Official

CERTIFICATE OF SERVICE

A copy of the foregoing was delivered to the above named employee on
9/9/83 (Date) at 5:00 PM. (Time).

Signature of Deliverer

EXHIBIT "B"

9-30-80 - Drunk in Possession of City Vehicle - Insubordination to Lt. Hair and Sgt. Parks.

4-15-83 - Unprofessional abusive conduct - Officer Tommy Menton.
4-15-83 - Insubordination - Sgt. Wayne Farmer.
8-26-83 - Unprofessional abusive conduct - K-Mart, Officer W. C. Garrick.
8-30-83 - Unprofessional abusive conduct - First National Bank , Overlook, Officer Robert R. Smith.
8-30-83 - Failure to complete proper reports.
8-30-83 - Failure to process automobile involved in incident.

Total sick time taken in past year:

34 days plus three weeks absent without pay.

202's which are disciplinary warnings by Police Department:

3-13-72 - Failed to attend court.
7-20-72 - Failed to attend court.
5-31-72 - Failed to attend court.
4-03-73 - Failed to turn in required reports.
4-30-73 - Failed to attend court.
5-14-76 - Failed to give address for department files.
5-12-77 - Failed to answer radio.
4-27-79 - Failed to answer radio.
10-15-80 - Failed to answer radio.
2-13-81 - Failed to answer radio.
5-12-81 - Sick
10-02-81 - Failed to answer radio.
10-14-82 - Failed to answer radio.
3-11-83 - Violation of lawful order.
4-22-83 - Sick.
4-24-83 - Sick.
7-09-83 - Sick.
7-20-83 - Sick.
7-29-83 - Sick.
7-20-83 - Oral reprimand - Failure to comply with order.
8-17-83 - Sick.

Suspensions:

8-15-72 - Failed to submit forms - AWOL, five days.
5-01-73 - Failed to answer complaint, three days.
9-19-77 - Failed to attend court, three days.
10-06-77 - Drunk, off duty, ten days, fired city shotgun at club.
11-03-77 - Drunk on duty, ten days.
8-01-79 - Disobeyed lawful and reasonable order, three days.
7-25-82 - Insubordination, ten days.

(Cont'd.)

A formal recommendation has been made, to this office, by Charles S. Summers, Captain, Patrol Division, that your employment with this department be terminated. That recommendation has specifically set out all those incidents set out herein above. Major Bernard Menebry Field Operations Bureau and Robert P. Larison, Assistant Chief of Police have both concurred in that recommendation.

The specific items set out above denote a violation of the following articles of the Mobile Police Department Rules of Conduct:

1.01 - Violation of rules.
1.02 - Unbecoming conduct.
1.05 - Reporting for duty.
1.06 - Neglect of duty.
1.09 - Leaving Duty Post.
1.11 - Unsatisfactory performance of duties.
1.15 - Use of alcohol on duty.
1.16 - Use of alcohol off duty.
1.18 - Insubordination.
1.24 - Citizen complaints.
1.25 - Courtesy.
1.39 - Departmental reports.
1.41 - Abuse of process.
1.48 - Treatment of persons in custody.

The specific items set out above also denote a violation Rule 14.2, (a), (c), (d) as to disorderly conduct, (g), (h), (i), (j), (l) and (m).

Specific complaints have been lodged against you upon three separate incidents within the last two weeks. Specifically, these involve a complaint of unprofessional and abusive conduct lodged against you on 8-26-83 and 8-30-83. They also include your failure to complete proper reports and failure to properly process an automobile involved in said incidents, both on 8-30-83. On, or about September 8, 1983, Mr. Christopher Galanos, lodged a complaint against you for unprofessional and abusive conduct and conduct unbecoming an officer of this department.

All of the complaints that have been lodged against you and specifically those complaints filed within the last two weeks, as set out above, have fully investigated by the Internal Affairs Division of this department and as a result of those investigations, I must concur that a pre-disciplinary hearing should be held and hereby inform you that such a hearing will be held in the office of the Chief of Police, City of Mobile, on September 10, 1983, at 5:05 P.M. You are requested to appear at hat time.

APPENDIX "C"

Winston J. Orr
Chief of Police

51 Government Street
Mobile, Alabama 36602

Police Department

September 12, 1983

FOR IDENTIFICATION
DATE 2/13/85 EX 2
LRD

Hon. Robert B. Doyle, Jr.
Mayor-Commissioner of Public Safety
City of Mobile
Mobile, Alabama

RE: OFFICER WILLIAM H. McGILL

Dear Sir:

I wish to advise you that disciplinary action has been taken against the above captioned officer of this department. This officer's Division Commander, Captain Charles S. Summers, has recommended to this office that said officer's employment with this department be terminated. Upon his recommendation, and the concurrence of Major Bernard Henebry and Assistant Chief Robert Larison, I have held, in accordance with the Rules and Policies of this department, and the Rules and Laws of the Personnel Board for Mobile County, a pre-disciplinary hearing.

At approximately 5:05 P.M., this date, a pre-disciplinary hearing was held in this office in order to give this employee an opportunity to respond to charges upon which disciplinary action was contemplated. At the conclusion of this pre-disciplinary hearing, and upon further consideration, I find that I must concur in the recommendation of my staff that Officer William H. McGill's employment with this department be terminated, effective September 12, 1983.

Find enclosed a copy of the pre-disciplinary action notice that was served upon Officer McGill. This notice fully and specifically sets out the detailed charges upon which I made my decision to terminate Officer McGill's employment. The specific items set out therein denote violation of the following articles of the Mobile Police Department's Rules of Conduct:

1.01 - Violation of rules
1.02 - Unbecoming conduct
1.05 - Reporting for duty
1.06 - Neglect of duty
1.09 - Leaving duty post

EXHIBIT "C"

1.11 - Unsatisfactory performance of duties
1.15 - Use of alcohol on duty
1.16 - Use of alcohol off duty
1.18 - Insubordination
1.24 - Citizen complaints
1.25 - Courtesy
1.39 - Departmental reports
1.41 - Abuse of process
1.48 - Treatment of persons in custody

The specific charges also denote a violation of the Laws and Rules of the Mobile County Personnel Board, specifically, Rule 14.2 (a) absence without leave; (c) conduct unbecoming an employee in the public service; (d) disorderly conduct; (g) incompetency or inefficiency; (h) insubordination; (i) intoxication while on duty or public intoxication while off duty; (j) neglect of duty; (l) violation of any lawful or reasonable regulation or order made and given by a superior officer, and (m) willful violation of any of the provisions of the Act or these Rules.

Specific complaints have been lodged against Officer McGill, upon three separate incidents within the last two weeks. Specifically, these involve a complaint of unprofessional and abusive conduct lodged against him on August 26, 1983 and August 30, 1983. They also include Officer McGill's failure to complete proper reports and failure to properly process an automobile involved in said incidents, both on August 30, 1983. On, or about September 8, 1983, Mr. Chris Galanos, lodged a complaint against Officer McGill for unprofessional and abusive conduct and conduct unbecoming an officer of this department. All of the complaints that have been lodged against Officer McGill, specifically those complaints filed within the last two weeks, as set out above, have been fully investigated by the Internal Affairs Division, of this department.

Your immediate attention to this matter is requested.

Sincerely,

Winston J. Orr
Chief of Police

WJO/gmw

Att.

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX "D"

CITY OF MOBILE

MOBILE, ALABAMA

COMMISSIONERS
GARY A. GREENOUGH
ROBERT D. EDDLE JR.
LAWRENCE C. MIMS

PLEASE ADDRESS REPLY TO P. O. Box 1527
Mobile, Alabama

September 13, 1983

Officer William M. McGill
Mobile Police Department

Dear Officer McGill:

On Saturday, September 10, 1983, a pre-disciplinary hearing was held in the Office of the Chief of Police. It was recommended by your supervisors, and concurred in by this Board, that your services with the Mobile Police Department be terminated effective September 13, 1983.

Your termination is a result of violation of the following Mobile Police Department Rules of Conduct:

1.01 - Violation of rules
1.02 - Unbecoming conduct
1.05 - Reporting for duty
1.06 - Neglect of duty
1.09 - Leaving duty post
1.11 - Unsatisfactory performance of duties
1.15 - Use of alcohol on duty
1.16 - Use of alcohol off duty
1.18 - Insubordination
1.24 - Citizen complaints
1.25 - Courtesy
1.39 - Departmental reports
1.41 - Abuse of process
1.48 - Treatment of persons in custody

Specific complaints have been lodged against you upon three separate incidents, within the last two weeks. Specifically, these involve a complaint of unprofessional and abusive conduct lodged against you on August 26, 1983, and August 30, 1983. They also include your failure to complete proper reports and failure to properly process an automobile involved in said incidents, both on August 26, 1983 and August 30, 1983. All of the complaints that have been lodged against you, and specifically those complaints filed within the last two weeks,

EXHIBIT "D"

as set out previously, have been fully investigated by the Internal Affairs Division of the Mobile Police Department.

Your termination is also a result of the violation of the corresponding laws and rules of the Personnel Board for Mobile County:

Rule 14.2 (a) absence without leave; (c) conduct unbecoming an employee in the public service; (d) disorderly conduct; (g) incompetency or inefficiency; (h) insubordination; (i) intoxication while on duty or public intoxication while off duty; (j) neglect of duty; (l) violation of any lawful or reasonable regulation or order made and given by a superior officer, and (m) willful violation of any of the provisions of the Act or these rules, of the Laws and Rules of the Personnel Board for Mobile County.

Sincerely,

Mayor

Commissioner

Commissioner

gmw

Att.

cc: Mr. Bernard M. Richardson, Jr.
Chief Winston J. Orr
Mrs. Elizabeth Batton
Legal
Payroll
Budget

PRE-DISCIPLINARY ACTION NOTICE

TO: William H. McGill
(Name of Employee)

FROM: Winston J. Orr, Chief of Police
(Appointing Authority)

SUBJECT: Dismissal
(Contemplated Disciplinary Action)

You are hereby advised that disciplinary action is contemplated against you for the following reason(s):

Your supervisors inform me that your record of performance with the Police Department in the past several years warrant you being terminated. From July 6, 1971, your employment date, to the present time, which is September 9, 1983, during this time, you have shown a marked deficiency in the characteristics and traits needed to function as a Police Officer. The following is a chronological order of events which bear out their observations and conclusions:

Accidents involving police cars:

5-07-72 - Worked three off days and reprimand
1-15-80 - Written reprimand
1-21-80 - Written reprimand

Incidents involving your conduct:

7-17-83 - Drinking off duty at High Chapperal (shot WM)
(cont'd)

You are further advised that on September 10, 1983 (Date) at 5:05 P.M. (Time) in the office of the undersigned, you will be allowed to respond orally or in writing to the above charges if you so desire. You are not required to make any statement at this interview if you do not desire to respond. You are not entitled to an adversary hearing at this time before the undersigned. Should you be disciplined, you have a right of appeal as granted by the Rules of the Personnel Board.

Winston J. Orr
Signature of Responsible Official

CERTIFICATE OF SERVICE

A copy of the foregoing was delivered to the above named employee on 9/9/83 (Date) at 5:00 PM (Time).

Signature of Deliverer

9-30-80 - Drunk in Possession of City Vehicle - Insubordination to Lt. Mair and Sgt. Parks.

4-15-83 - Unprofessional abusive conduct - Officer Tommy Menton.
4-15-83 - Insubordination - Sgt. Wayne Farmer.
8-26-83 - Unprofessional abusive conduct - K-Mart, Officer W. C. Garrick.
8-30-83 - Unprofessional abusive conduct - First National Bank , Overlook, Officer Robert R. Smith.
8-30-83 - Failure to complete proper reports.
8-30-83 - Failure to process automobile involved in incident.

Total sick time taken in past year:

34 days plus three weeks absent without pay.

202's which are discipinary warnings by Police Department:

3-13-72 - Failed to attend court.
7-20-72 - Failed to attend court.
5-31-72 - Failed to attend court.
4-03-73 - Failed to turn in required reports.
4-30-73 - Failed to attend court.
5-14-76 - Failed to give address for department files.
5-12-77 - Failed to answer radio.
4-27-79 - Failed to answer radio.
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5-12-81 - Sick
10-02-81 - Failed to answer radio.
10-14-82 - Failed to answer radio.
3-11-83 - Violation of lawful order.
4-22-83 - Sick.
4-24-83 - Sick.
7-09-83 - Sick.
7-20-83 - Sick.
7-29-83 - Sick.
7-20-83 - Oral reprimand - Failure to comply with order.
8-17-83 - Sick.

Suspensions:

8-15-72 - Failed to submit forms - AWOL, five days.
5-01-73 - Failed to answer complaint, three days.
9-19-77 - Failed to attend court, three days.
10-06-77 - Drunk, off duty, ten days, fired city shotgun at club.
11-03-77 - Drunk on duty, ten days.
8-01-79 - Disobeyed lawful and reasonable order, three days.
7-25-82 - Insubordination, ten days.

(Cont'd.)

A formal recommendation has been made, to this office, by Charles S. Summers, Captain, Patrol Division, that your employment with this department be terminated. That recommendation has specifically set out all those incidents set out herein above. Major Bernard Henebry Field Operations Bureau and Robert P. Larison, Assistant Chief of Police have both concurred in that recommendation.

The specific items set out above denote a violation of the following articles of the Mobile Police Department Rules of Conduct:

1.01 - Violation of rules.
1.02 - Unbecoming conduct.
1.05 - Reporting for duty.
1.06 - Neglect of duty.
1.09 - Leaving Duty Post.
1.11 - Unsatisfactory performance of duties.
1.15 - Use of alcohol on duty.
1.16 - Use of alcohol off duty.
1.18 - Insubordination.
1.24 - Citizen complaints.
1.25 - Courtesy.
1.39 - Departmental reports.
1.41 - Abuse of process.
1.48 - Treatment of persons in custody.

The specific items set out above also denote a violation Rule 14.2, (a), (c), (d) as to disorderly conduct, (g), (h), (i), (j), (l) and (m).

Specific complaints have been lodged against you upon three separate incidents within the last two weeks. Specifically, these involve a complaint of unprofessional and abusive conduct lodged against you on 8-26-83 and 8-30-83. They also include your failure to complete proper reports and failure to properly process an automobile involved in said incidents, both on 8-30-83. On, or about September 8, 1983, Mr. Christopher Galanos, lodged a complaint against you for unprofessional and abusive conduct and conduct unbecoming an officer of this department.

All of the complaints that have been lodged against you and specifically those complaints filed within the last two weeks, as set out above, have fully investigated by the Internal Affairs Division of this department and as a result of those investigations, I must concur that a pre-disciplinary hearing should be held and hereby inform you that such a hearing will be held in the office of the Chief of Police, City of Mobile, on September 10, 1983, at 5:05 P.M. You are requested to appear at that time.

APPENDIX "E"

CITY OF MOBILE

MOBILE, ALABAMA

COMMISSIONERS

GARY A. GREENOUGH

ROBERT B. COYLE, JR.

LAMBERT C. MIMS

PLEASE ADDRESS REPLY TO P. O. Box 1827
Mobile, AL 36633-1627

October 18, 1983

Mr. William H. McGill
2620 Longleaf Drive
Mobile, Al 36609

Dear Mr. McGill:

This is to advise you of the disciplinary action taken this date by the Board of Commissioners of the City of Mobile, Alabama. You are advised that your employment with the City of Mobile Police Department is terminated this date.

The reasons for your termination are that you have violated the various Laws and Rules of the Mobile County Personnel Board, and the Rules and Regulations of the Mobile Police Department as set forth in the Pre-Disciplinary Action Notice. A copy of this Notice is attached hereto and incorporated herein as though set forth in full.

The Board of Commissioners designated a Hearing Officer to conduct the Pre-Disciplinary Hearing and said hearing was held on October 11, 1983. We are advised that you were represented by legal counsel and were given full opportunity to respond to the allegations as contained in the Pre-Disciplinary Action Notice. We have reviewed the factual findings made by the Hearing Officer, and based upon our review of these facts, find that you have violated each of the rules as set forth in the Pre-Disciplinary Action Notice.

You are furthermore advised that your termination is not predicated in any part upon your action on the evening of September 7, 1983 when you were involved in an incident with the District Attorney for Mobile County, Honorable Chris Galanos; but, the action taken by the Board of Commissioners is based wholly upon the finding that you have violated the various Laws and Rules of the Mobile County Personnel Board and the Rules and Regulations of the Mobile Police Department, by your actions of April 15, 1983; August 26 and 30, 1983; and September 9, 10 and 11, 1983.

EXHIBIT "E"

In addition, your past record of misconduct while a Police Officer, when combined with your actions as set forth in the Pre-Disciplinary Action Notice can only lead us to the conclusion that you are unable or unwilling to improve your level of performance as a Police Officer, and leaves us with no alternative but to terminate your employment.

Very sincerely yours.

Mayor

Commissioner

Commissioner

RS/bak

cc: Mr. Bernard H. Richardson, Jr.
Chief Winston J. Orr
Mr. Lee Hale
Legal
Payroll
Budget
Mrs. Batton

PRE-DISCIPLINARY ACTION NOTICE

TO: WILLIAM H. McGILL
(Name of Employee)

FROM: BOARD OF COMMISSIONERS OF THE CITY OF MOBILE
(Appointing Authority)

SUBJECT: DISMISSAL
(Contemplated Disciplinary Action)

You are hereby advised that disciplinary action is contemplated against you for the following reasons: Violation of the following Rules of the Personnel Board of Mobile County: Rule 14.2(c) Conduct unbecoming an employee in the public service; (d) Disorderly conduct; (h) Insubordination; (i) Violation of a lawful or reasonable regulation or order made and given by a superior officer; and

(Continued on Pages 2 through 7, attached)

You are further advised that on October 11, 1983, at 3:00 o'clock P.M., in the City Commission Conference Room, City Hall, Mobile, Alabama, you will be allowed to respond orally or in writing to the above and attached charges, before a hearing officer to be designated by the Board of Commissioners, if you so desire. You are not required to make any statement at this interview if you do not desire to respond. You are not entitled to an adversary hearing at this time before the hearing officer to be designated by the Board of Commissioners of the City of Mobile.

Should you be disciplined, you have a right of appeal as granted by the Rules of the Personnel Board. You are entitled to have the assistance of counsel at the pre-disciplinary hearing.

SIGNATURE OF RESPONSIBLE OFFICIAL

CERTIFICATE OF SERVICE

A copy of the foregoing was delivered to the above named employee on 10-7-83 (date), at 11:50 AM. (time).

SIGNATURE OF DELIVERER

Violation of the following Rules and Regulations of the Mobile Police Department: Rule 1.02 - Unbecoming conduct (Officers shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the department. Conduct unbecoming an officer shall include that which brings the department in disrepute by eroding public confidence, reflects discredit upon the officer as a member of the department, or that which impairs the morale, operation or efficiency of the department, officer or assigned division); Rule 1.18 - Insubordination, (Officers shall promptly obey any lawful orders of a superior officer); Rule 1.25 - Courtesy (Officers shall be courteous to the public. Officers shall be tactful in the performance of their duties, shall control their tempers, and exercise the utmost patience and discretion, and shall not engage in argumentative discussions even in the face of extreme provocation. In the performance of their duties, officers shall not use coarse, violent, profane or insolent language or gestures * * *);

In that on August 26, 1983,at the K-Mart Department Store, 4665 Airport Boulevard, Mobile, Alabama at approximately 11:50 A.M. you were very disrespectful towards Cpl. William Garrick of the Mobile Police Department, your superior. Your actions toward Cpl. Garrick were rude, arrogant, and unprofessional. Cpl. Garrick had requested your assistance at the K-Mart Department Store, to help with the reports on a shoplifter there. When you arrived at the store you started arguing with Cpl. Garrick in a manner that was unprofessional and insubordinate. Your conduct was observed by the staff personnel at K-Mart. When Cpl. Garrick, in the presence of the personnel staff at K-Mart, ordered you to leave, you refused and continued to argue. This was degrading to your superior officer as well as the Mobile Police Department.

Violation of the following Rules of the Personnel Board: Rule 14.2 (c) Conduct unbecoming an employee in the public service; (d) Disorderly conduct; (j) Neglect of duty; (l) Violation of a lawful or reasonable regulation or order made and given by a superior officer; and

Violation of the following Rules of the Mobile Police Department: Rule 1.02 - Unbecoming conduct (See above); Rule

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1.25 - Courtesy (See above); Rule 1.39 - Departmental Reports (Officers shall submit all necessary reports on time and in accordance with established departmental procedures * * *);

In that on August 30, 1983, you were assigned to investigate the complaint that a white female was attempting to cash an alleged forged check in the amount of $325.00 at the First National Bank, 4823 Overlook Road, Mobile, Alabama, on the account of Douglas Hammac, d/b/a/ Hammac Wrecker Shop, 2730 Highpoint Boulevard, Mobile, Alabama. Officer Robert Smith was assigned as backup unit.

When you arrived on the scene you began to argue with Mr. Hammac asking him to drop the charges against the white female who had attempted to cash the alleged forged check drawn on Mr. Hammac's account. When Mr. Hammac refused, you argued with him and engaged in a heated conversation with him, and called him a "damn liar". When Mr. Hammac asked you to call a supervisor, you refused, so Mr. Hammac requested Officer Robert Smith to call a supervisor, and Officer Smith complied. You also argued with Officer Smith, because he would not transport the white female to place her on docket, because Officer Smith wanted to wait for the supervisor, Sgt. Sweet's, arrival.

Further, you left the bank without filling out the proper reports and paper work. Officers Cynthia Taylor and Richard Wiggins were also investigating the complaint as backup officers and you refused to allow the backup officers to pull the arrested person's vehicle in.

Violation of the following Rules of the Personnel Board of Mobile County: Rule 14.2 (c) Conduct unbecoming an employee in the public service; (1) Violation of a lawful or reasonable regulation or order made and given by a superior officer; and

Violation of the following Rules of Conduct of the Mobile Police Department: Rule 1.01 - Violation of Rules (Officers * * * shall not commit any acts or omit any acts which constitute a violation of any of the rules, regulations, directives or orders of the Department * * *); Rule 1.02 - Unbecoming conduct (See above); Rule 1.30 - Public statements and appearances (A. Officers shall not

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publicly criticize or ridicule the department, its policies, or other officers by speech, writing, or other expression, where such speech, writing, or other expression * * * undermines the effectiveness of the department, interferes with the maintenance of discipline, or is made with reckless disregard for truth or falsity. B. Officers shall not * * * appear on radio or television, prepare any articles for publication * * * release or divulge investigative information, or any other matters of the department while holding themselves out as representing the department in such matters without prior authority); Rule 1.37 Dissemination of information (Officers shall treat the official business of the department as confidential * * *);

In that on September 7, 1983, at approximately 10:40 P.M., while you were parked on Airport Boulevard in your police vehicle and while on duty, you observed an automobile with a blue emergency light flashing, proceeding east on Airport Boulevard near Downtowner Boulevard. You gave pursuit to determine who was operating a plain vehicle with a blue emergency light. At the intersection of Airport Boulevard and Windsor Place, in front of the Airport Twin Cinema, you turned on your blue lights and stopped the vehicle. You recognized the driver as the District Attorney of Mobile County, Mr. Chris Galanos, and inquired whether anything was wrong. Mr. Galanos replied that he had an emergency at his ex-wife's house and gave directions to the house to you (by proceeding to Dauphin at Upham, to Springhill Avenue and then on Springhill Avenue to DeSales to her apartment in the D'Iberville Apartments.) You instructed Mr. Galanos to follow you and you advised Police Communications that you were conducting an escort. You escorted Mr. Galanos at a high rate of speed and when you arrived at the destination on Portier Court, Mr. Galanos got out of his car and turned to thank you. From Mr. Galanos' actions you suspected he was intoxicated and requested him to get in the back seat of your Police car. Mr. Galanos asked you to allow him to check on the status of his ex-wife and child, but you refused, so Mr. Galanos got into the back of your patrol car. Although Mr. Galanos requested that you not to talk with his ex-wife without his presence because it would frighten her, you refused and instead questioned his ex-wife. When his ex-wife told you there was no emergency, you were convinced that Mr. Galanos had misled you to believe that an emergency existed and were further convinced that Mr. Galanos was intoxicated.

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Before you arrived at the destination you had asked for assistance from Cpl. Buddy Allen, and Cpl. Allen called his supervisors, Lt. Pete Holifield and Sgt. Obie Singletary to the scene. The supervisors determined that Mr. Galanos was not intoxicated. Although you insisted on having Mr. Galanos arrested, your supervisors determined that he should not be arrested because he was not intoxicated. They also determined from talking with Mrs. Galanos that there had been an emergency regarding their child, as their child had been lost earlier. Knowing that Mr. Galanos was the District Attorney, and that his actions would be of interest to the news media, you complicated the matter by giving interviews regarding the case to the news media, television, radio and newspapers, on or about September 9, 10, and 11, 1983. By these statements and accusations which you made to the news media against Mr. Galanos and the Mobile Police Department, you have publicly criticized and ridiculed the department and its officers, including Lt. Peter Holifield and Sgt. Obie Singletary, and those public statments have undermined the maintenance of discipline within the department, or were made with reckless disregard for truth or falsity.

Violation of the following Rules of the Personnel Board:

Rule 14.2 (c) Conduct unbecoming an employee in the public service; (h) Insubordination; (l) Violation of a lawful or reasonable regulation or order made and given by a superior officer; and

Violation of the following Rules of Conduct of the Mobile Police Department:

Rule 1.02 - Unbecoming conduct (See above); Rule 1.18 - Insubordination (See above); Rule 1.25 - Courtesy (See above).

In that on April 15, 1983, about 10:30 P.M., Det. Sgt. Wayne Farmer of the Mobile Police Department was on assignment investigating a robbery at the Goodyear Tire Store at 600 Government Street, Mobile, Alabama. Upon his arrival

at the scene, you were on duty and talking with one of the victims, the security guard. Officer Tommy Menton, a junior officer arrived on the scene, and you shouted to him, "Turn off those God damn blue lights". While the officers were investigating the case at the scene, Officer Leslie Kohn brought in another victim. Sgt. Farmer started to interview the victim outside your patrol car and asked you to turn your radio down so they could talk. You ignored Sgt. Farmer's request. Again, he asked you to turn the radio down. You walked off without doing so. Sgt. Farmer asked you to transport the complainant to C.I.D. You ignored his request and talked to other people at the scene. When Sgt. Farmer again told you to take the man to C.I.D., you asked if he, Sgt. Farmer, was in charge of the investigation, and when Sgt. Farmer replied that he was, you said you would take the man there, but still you did not do so. When Sgt. Farmer told you the third time to take the man to C.I.D., you told Sgt. Farmer in substance: "Back off, don't press your luck with me. I'll do it when I am ready."

Your actions towards Sgt. Farmer were highly unprofessional and insubordinate. Your actions were in the presence of your fellow police officers, junior to you, as well as in the presence of members of the public. Your conduct was unprofessional and detrimental to the department and your fellow police officers and undermines good discipline.

Your tour of duty as a police officer with the Mobile Police Department from the date of your employment, July 6, 1971, to and including September 11, 1983, has been one of deficiency in the characteristics and traits needed for functioning as a police officer.

By action of the Board of Commissioner, on August 15, 1972, you were suspended from duty for five (5) days effective August 23, 1972, for failing to submit the required forms for your military training leave and for violation of Rule 14.2 (a) - Absent without leave - of the Rules of the Personnel Board; by action of the Board of Commissioners of May 1, 1973, you were suspended from duty for three (3) days, effective May 4, 1973, for failure to comply with department procedures regarding handling of traffic accidents and making accident reports in violation of Rule 14.2(1) of the

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Personnel Board Rules - Violation of a lawful or reasonable regulation or order made and given by a superior officer; by action of the Board of Commissioners of June 28, 1977 and July 6, 1977, you were suspended from duty for three (3) days, July 5, July 8 and July 9, 1977, for violation of Rule 14.2(1) of the Rules of the Personnel Board - Violation of a lawful or reasonable regulation or order made and given by a superior officer; you were suspended for three (3) days effective September 26, 1977 for failure to appear in court having being ordered to do so.

By action of the Board of Commissioners, you were suspended for ten (10) days effective November 10, 1977 for violation of Rule 14.2(c) Conduct unbecoming an employee in the public service; Rule 14.2(i) Intoxication while on duty or public intoxication while off duty; and Rule 14.2(l) Violation of a lawful or reasonable regulation or order made and given by a superior officer, in that you, while in a very drunken condition fired a departmental shotgun in the air at the scene of a disorder at a lounge on Halls Mill Road on September 15, 1977; by action of the Board of Commissioners dated July 26, 1979, you were suspended for three (3) days effective August 1, 1979 for violation of Rule 14.2(l) Violation of a reasonable regulation or order made and given by a superior officer.

By action of the Personnel Board, dated February 18, 1983, you were suspended for a period of ten (10) days for insubordination.

The latest incidents of your misconduct while a member of the Mobile Police Department occurred in April, 1983, August 1983, and September 1983, as set out above, and based upon those incidents, in combination with your record of previous bad conduct, as outlined above, and your apparent unwillingness or inability to improve the level of your employment with the City, and your dismissal from the Mobile Police Department has been recommended by your superior officers.

APPENDIX "F"

CITY OF MOBILE

MOBILE, ALABAMA

October 18, 1983

PLEASE ADDRESS REPLY TO P. O. Box 1827

COMMISSIONERS

GARY A. GREENOUGH
FINANCE

ROBERT B. DOYLE, JR.
PUBLIC SAFETY

LAMBERT C. MIMS
PUBLIC WORKS

Honorable Robert B. Doyle, Jr.
Mayor/Public Safety Commissioner

Honorable Lambert C. Mims
Public Works Commissioner

Gentlemen:

After having carefully reviewed the reports and information concerning Officer William H. McGill, it is apparent that the incident which led to his termination was the incident which occurred on September 7th. Inasmuch as Officer McGill has not been charged with any wrong doing involving the District Attorney, it would be unfair, in my opinion, to terminate him as a result of the ensuing publicity surrounding this incident.

I have reviewed Mr. Blackwell's report, who served as the Pre-disciplinary Hearing Officer in this matter, and agree with his findings that the other incidents which were made a basis of the pre-disciplinary hearing are not sufficient in nature to require termination. Therefore, I cannot sign a letter of termination on this employee.

Sincerely,

Gary A. Greenough
Finance Commissioner

EXHIBIT "F"

APPENDIX "C"

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

REPORT OF THE OCTOBER
1983 MOBILE COUNTY GRAND JURY

We, the October session convened on October 24, 1983, respectfully present the folowing report to the Court. We considered four cases and submit one misdemeanor indictment.

The Grand Jury recommends that the practice of prescribing scheduled drugs by the medical community of Mobile be investigated at some future date.

We further find that the procedures followed by the Mobile Police Department on the night of September 7, 1983 left a lot to be desired and should be reviewed in light of this report.

The Grand Jury found no evidence to support the charge that there was, on or before the night of September 7, 1983, any conspiracy to discredit Mr. Galanos in order to hinder any investigation that he may have had in progress.

Finally, the Grand Jury found no evidence to support the charge that Officer Billy McGill violated Alabama Code, Title 36-10-5 which prohibits the unlawful detention of another under color of officer.

With this report, we respectfully ask to be placed in recess until the next session of the Grand Jury.

Troy B. Crane, Foreman

Joan H. Leiser

Guerry B. Isler

Gwendolyn B. Towner

Linda H. Chruszczyk

Alva Y. Johnston

Edna B. Morris

Cussie A. Jackson

Audrey F. Robinson

Sheridean C. Hacker

Evelyn A. Gamble

Ruth B. Parnell

EXHIBIT "C"

Douglas M. Franklin

Jesse H. Walker

Bobby R. Varner

Gaylord E. Waldrop

Katherine K. Mattei

Anna D. Odom